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No. 04-1527

In The

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the mere flow of water through an existing dam constitute a "discharge" under Section 401, 33 U.S.C. § 1341, of the Clean Water Act, despite this Court's holding last year in *Miccosukee* that a discharge requires the addition of water from a distinct body of water?

2. Does the State of Maine's expansive application of Section 401 conflict with the Federal Energy Regulatory Commission's comprehensive licensing authority over hydroelectric generating projects under the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*?

CORPORATE DISCLOSURE STATEMENT AND PARTIES BELOW

The parties to the appeal before the Maine Supreme Judicial Court ("SJC") were Petitioner S.D. Warren Company ("Warren"), Respondent Maine Department of Environmental Protection ("DEP"), and Intervenors American Rivers and Friends of the Presumpscot River.

Warren is a direct wholly-owned subsidiary of SDW Holdings Corporation (a Delaware corporation), which is a wholly-owned subsidiary of Sappi Papier Holding GmbH (Austria), which is a wholly-owned subsidiary of Sappi Holding GmbH (Austria), which is a wholly-owned subsidiary of Sappi Limited. Therefore, S.D. Warren Company is an indirect wholly-owed subsidiary of Sappi Limited. Sappi Limited is a South African corporation that is publicly traded on the Johannesberg, New York, Frankfurt, and London stock exchanges, and has no publicly traded subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

S.D. Warren Company petitions for a writ of certiorari to review the decision of the SJC upholding the DEP's decision to require Warren to obtain state water quality certification for the relicensing by the Federal Energy Regulatory Commission ("FERC") of five hydroelectric dam projects, and allowing the DEP to subvert FERC's licensing authority.

OPINIONS BELOW

The two DEP orders are unreported but are reprinted in the Appendix ("App."), the DEP Commissioner's initial certification order (the "Certification") at App. A-74 and the Board of Environmental Protection's ("BEP's") order on appeal of the Certification at App. A-35. The Maine Superior Court's opinion, *S.D. Warren Co. v. Maine Department of Environmental Protection*, No. AP-03-70 (Me. Super. Ct., Cum. Cty., May 4, 2004), is unreported but is reprinted in the Appendix at A-19. The SJC's opinion upholding the Superior Court's order, entered February 15, 2005, is reported at *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, and is reprinted in the Appendix at App. A-1.

JURISDICTION

The SJC exercised jurisdiction over Warren's appeal pursuant to ME. REV. STAT. ANN. tit. 5, §§ 11001(1) and 11008(1). The order of the SJC was entered on February 15, 2005. This Court's jurisdiction rests upon 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

At issue in this case is the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq*. (the "Clean Water Act" or "CWA"), in particular Section 401, 33 U.S.C. § 1341, and the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a *et seq*. The Appendix contains the pertinent text from 33 U.S.C. §§ 1341, 1342, and 1362 and 16 U.S.C. §§ 797, 799, 803, and 821.

STATEMENT OF THE CASE

I. The operative facts are undisputed: Warren owns and operates existing run-of-river hydropower projects and applied for water quality certification, under protest, for the relicensing by FERC of those projects.

Warren owns and operates five hydroelectric generating dam projects (the "Projects") located on the Presumpscot River in Maine. *Warren*, 2005 ME, ¶ 2, App. at A-2, *Warren*, AP-03-70 at 1, App. at A-19. All five of the Projects were constructed in the early 1900s. *Warren*, 2005 ME, ¶ 3, App. at A-2. The Projects provide electricity to Warren's Westbrook paper mill. *Warren*, 2005 ME, ¶ 1, App. at A-1.

The Projects are operated in run-of-river mode, meaning that outflow from each dam is equal to inflow during normal operating conditions. App. at A-120. The Projects do not remove water from the river, and they do not introduce any substance, pollutant or otherwise, into the water. *See* App. at A-87 to A-88, A-106 to A-110, A-120 to A-121.

FERC licenses for the Projects expired on January 26, 2001. As part of the FERC relicensing process, on January 14, 1999, Warren submitted applications to the DEP for CWA Section 401 certifications. *Warren*, 2005 ME, ¶ 3, App. at A-2. In submitting these applications – which the DEP instructed Warren to file – Warren stated that water quality certification was not in fact needed, and expressly reserved its rights to make this argument. SJC Appendix ("SJC App.") tab 11 at 133.

II. Agency Action: The Maine DEP requires Warren to obtain water quality certification and assumes a primary role in the relicensing and ongoing regulation of the Projects.

In April 2003, the DEP Commissioner issued the Certification, holding that, pursuant to Section 401 of the CWA, water quality certification is required for the FERC relicensing of the Projects. The Certification contains a host of conditions relating to water levels and flows, impoundment drawdowns and refill procedures, eel and fish passage, reaeration measures, and recreational facilities. Perhaps most significantly, the Certification also includes "reopeners," *i.e.*, conditions that allow the DEP to reopen the Certification by imposing additional or different requirements in the future. App. at A-123, A-125 to A-128, A-134 to A-137, A-139.

Warren appealed the Certification to the BEP. *Warren*, 2005 ME, ¶ 3, App. at A-2. The BEP affirmed after *de novo* review. App. at A-37 to A-38, A-73.

III. Judicial Review

Warren timely filed a petition for review in the Maine Superior Court. Warren argued, *inter alia*, that water flowing through a dam – where nothing is added to the water either by the dam or from outside the water body – does not constitute a "discharge into" the water that triggers Section 401 certification requirements. Warren also argued that even if water passing through a dam qualified as a discharge, only the discharge of a "pollutant" requires certification. Further, Warren argued that even if water without a pollutant qualified as a discharge, relicensing the Projects would not "result in" a discharge because the relicensing of the existing Projects would simply allow the preexisting discharge (assuming a discharge existed) to continue. Finally, Warren challenged the "reopener" provisions of the Certification.

The Superior Court denied Warren's appeal. Warren appealed to the SJC, which issued its decision denying Warren's appeal on February 15, 2005.

The SJC, addressing the issue of whether water flowing through a dam constitutes a "discharge" under Section 401 of the CWA, created an entirely new legal test and concluded that, based on that test, all water passing through a dam qualifies as a discharge. *Warren*, 2005 ME, ¶¶ 12-13, App. at A-7 to A-8.

The SJC properly began its analysis by looking to the statutory language. The SJC stated:

> The term discharge is not expressly defined anywhere in the CWA, however, section 502(16), 33 U.S.C.A. § 1362(16) (West 2001), provides that, "[t]he term 'discharge when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress."

Id. ¶ 10, App. at A-6 (citing *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997)). The definition of the phrases "discharge of a pollutant" and "discharge of pollutants" both mean:

> (A) any *addition* of any pollutant to navigable waters from any point source,
>
> (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (emphasis added). The SJC thus reasoned that "[a]n 'addition' is the fundamental characteristic of any discharge." *Warren*, 2005 ME, ¶ 11, App. at A-6.

In assessing whether water flowing through a dam constitutes an "addition" the SJC then created a new legal test, focusing on whether the water is subject to "private control." *Id.* ¶¶ 12-13, App. at A-7 to A-8. The SJC reasoned that the moment water passes through a dam it is subject to "private control" and thus temporarily loses its status as waters of the United States.[1] As a result of this temporary change in status, the SJC reasoned that when water "exiting" a dam "reconnects" with water that moments before followed the same path, but now once again is classified as "waters of the United States," this "reintroduction" of different water (*i.e.*, non-waters of the United

[1] Section 401 of the CWA, 33 U.S.C. § 1341, applies to discharges into navigable waters. Navigable waters are defined as the "waters of the United States" at Section 502(7), 33 U.S.C. § 1362(7).

States) constitutes an "addition." Such an "addition" of clean water, the SJC concluded, is a "discharge" requiring water quality certification pursuant to Section 401. *Id.*

The SJC also rejected Warren's argument that Section 401 requires state certification only for discharges of "pollutants." *Id.* ¶¶ 14-16, App. at A-8 to A-10. The SJC reasoned that the word "discharge" has been interpreted broadly. *Id.* ¶ 14, App. at A-8. Such an interpretation, said the SJC, encompasses the discharge of anything – even clean water – not just pollutants.

The SJC did not address Warren's argument that the statutory language of Section 401 establishes that certification is required only for any discharge that may "result in" a discharge into navigable waters, but that relicensing the Projects merely authorized the continued presence of a discharge, assuming one exists. *See* 33 U.S.C. § 1341(a)(1).

Finally, the SJC considered and rejected Warren's argument that the DEP exceeded its authority by including reopener conditions in the Certification. After acknowledging that forcing FERC either to accept these conditions or to deny the license altogether could produce "harsh results," the SJC nonetheless concluded that nothing in federal law prohibits reopeners. *Warren*, 2005 ME, ¶ 26, App. at A-14 to A-15.

REASONS FOR GRANTING THE WRIT

Dams such as those at issue here should not be subject to the certification requirements of the CWA because they add nothing to the water. The contrary holding by the Maine SJC conflicts with established

precedent of this Court and with the approach of many other courts, defies common sense, is an unsupportable interpretation of the statute, and further confuses the law in an area that urgently needs clarification by this Court. Further, the SJC's interpretation usurps FERC's exclusive regulatory authority over hydropower projects like those in this case, thus undermining federal control over this vitally important national energy sector. Warren respectfully petitions this Court to correct the SJC and add clarity to this important area of law. Specifically, the Court should grant the writ for three reasons.

1. **The Maine SJC's decision in *Warren* conflicts with this Court's decision in *Miccosukee*.** First, the issue of what constitutes an "addition" and thus a "discharge" under the CWA is an important question of federal law, which the SJC answered in a way that directly conflicts with this Court's decision in *South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004). *See* S. Ct. Rule 10(c). The importance of this question is difficult to overstate because the interpretation of the word "discharge" determines the scope of the CWA – the primary federal statute designed to regulate activities that may impact water quality throughout the United States. Not only does the Section 401 certification requirement hinge on whether there is a "discharge," but so too does the need for a Section 402 permit issued as part of the CWA's National Pollutant Discharge Elimination System ("NPDES").[2] It was in this latter context that this Court, in *Miccosukee*, addressed the question of what constitutes an "addition." As discussed below, the

[2] Section 402, 33 U.S.C. § 1342, establishes the NPDES program and authorizes the U.S. Environmental Protection Agency to require a permit for the "discharge" of any pollutant into navigable waters.

SJC's interpretation in *Warren* of the words "addition" and "discharge," and its application of those words to Section 401, directly contradicts this Court's decision in *Miccosukee*.

2. **What constitutes an "addition" under the CWA is an important question of federal law warranting clarification by this Court; without clarification confusion among the courts and regulatory agencies will persist.** Second, a grant of *certiorari* will give the Court the opportunity to settle the confusion among the circuit and state courts, and federal and state agencies, about what constitutes an "addition" triggering Section 401 certification requirements. How to interpret the Clean Water Act is an important federal question worthy of this Court's attention even if the direct conflict noted in the preceding paragraph did not exist. *See* S. Ct. Rule 10(c). Prior to *Miccosukee*, several of the U.S. Circuit Courts of Appeals had addressed the issue of when the mixing of water is considered an "addition" under the CWA. As discussed below, the decisions reached by the different circuits were inconsistent. While *Miccosukee* should have settled this issue, the Maine SJC's decision in *Warren* illustrates that some courts do not believe *Miccosukee*'s reasoning applies in the context of Section 401. This Court should eliminate this misunderstanding by clarifying that the test in *Miccosukee* for determining whether an "addition" occurs applies to both sections 402 and 401.

3. **The State of Maine's expansive application of Section 401 conflicts with FERC's comprehensive licensing authority over hydroelectric generating projects under the FPA.** Third, this case demands the Court's intervention because the SJC's opinion in *Warren* conflicts with the comprehensive jurisdiction of FERC in hydropower licensing proceedings. The State of Maine is using its CWA certification

authority effectively to displace FERC's authority under the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* ("FPA"). Pursuant to *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997), FERC has no authority to reject conditions imposed by states in their certifications; such conditions may only be rejected by state courts in an appeal of the certifications through the state's appeal process. Because the Maine courts are complicit in the State's efforts to use its Section 401 authority to displace FERC's FPA authority, only this Court can correct the State of Maine's power grab. S. Ct. Rule 10(c). The SJC's expansive interpretation of a state's authority under Section 401 is directly at odds with the primary authority Congress, in the FPA, granted to FERC to license hydropower projects. Warren therefore asks this Court to clarify the relationship between FERC's role and the states' role in the licensing of hydropower projects. *See id.*

I. The Maine SJC's decision in *Warren* conflicts with this Court's decision in *Miccosukee*.

The SJC's reasoning that a dam exercises private control over water, that the water passing through a dam thus temporarily loses its status as "waters of the United States," and that reintroduction of this water (now allegedly non-waters of the United States) constitutes an "addition," is directly contrary to this Court's decision in *Miccosukee*. The appropriate test, as articulated in *Miccosukee*, is based not on private control but on whether the waters being mixed are from "meaningfully distinct water bodies." *See Miccosukee*, 541 U.S. at 112.

A. This Court's Statements on What Constitutes an "Addition" – The Mixing of Water From Meaningfully Distinct Water Bodies.

Last year in *Miccosukee*, this Court addressed the question of what constitutes an "addition" (and thus a "discharge") under CWA Section 402. In *Miccosukee*, as part of the Central and South Florida Flood Control Project, water was pumped from a canal to a wetland area sixty feet away. To determine whether this pumping of water into the wetland was an "addition" this Court stated that the dispositive question was whether the canal and wetland are "meaningfully distinct water bodies." *Id.* If they are, the pumping is an "addition." If they are not, the pumping of the water from one location to another did not "add" anything to the navigable water: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains*, 273 F.3d at 492).

Thus, for there to be an "addition" to the waters of the United States, something must be added into the water from outside the water. Taking water out of the water body and then redepositing that same water back into the water body is not an "addition."

B. The reasoning in *Miccosukee* applies to CWA Section 401.

CWA Section 402 authorizes the U.S. Environmental Protection Agency ("EPA") or a delegated state to "issue a permit for the discharge of any pollutant." 33 U.S.C. § 1342(a)(1). CWA Section 401 requires state water quality certification for a federally-licensed activity that may

result in a "discharge." *Id.* § 1341(a)(1). The word "discharge," as used in both sections 401 and 402, includes the "discharge of a pollutant." *Id.* § 1362(16). As a result, the word "discharge," used in Section 401, must be read consistently with the term "discharge of a pollutant," used in Section 402. *North Carolina*, 112 F.3d at 1187.

The CWA defines "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Thus, the meaning of "addition" is fundamental to interpreting both sections 401 and 402. *See North Carolina*, 112 F.3d at 1187 (interpreting Section 401 and stating, "the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word 'discharge' contemplates the addition . . . of a substance or substances"). Because the same key definitional phrase is being interpreted, both Section 401 and Section 402 case law are directly relevant to the issue of what qualifies as an "addition."

C. The Maine SJC in *Warren* applied the wrong legal test and, as a result, reached the wrong conclusion.

Although the SJC in *Warren* acknowledged that Section 401 applies only when there has been an "addition" to navigable waters, the SJC improperly focused its analysis on whether water flowing through a dam is "privately controlled," making the asserted change in "control" the dispositive issue. *Id.* ¶¶ 12-13, App. at A-7 to A-8. This Court in *Miccosukee*, however, established that control of the water is not dispositive in determining whether there has been an addition.

As noted above, the question in *Miccosukee* was whether water pumped from a canal into a nearby wetland constituted an "addition." Although pumping water is an example of private control, this Court stated that the dispositive issue was whether the canal and wetland are "meaningfully distinct water bodies," not whether someone or something has exercised private control over the water. *Miccosukee*, 541 U.S. at 112. If water from distinct water bodies is combined, the introduction of this foreign water into the receiving water is an *addition* of something new from the outside world. If the water being mixed is not from two distinct water bodies, an addition does not occur.

Applying this reasoning from *Miccosukee*, the water flowing through Warren's Projects does not constitute an addition. First, it is undisputed that the water above, below, and momentarily within each dam is all part of the same body of water – the Presumpscot River. Second, it is undisputed that the dams do not introduce any pollutant, such as oil, grease, or heat, into the water. Just as lifting a ladle of soup from a pot and pouring the ladle's contents back into the pot does not constitute an addition, water flowing through Warren's dams similarly adds nothing new to the Presumpscot River. *See id.* at 110. Absent such an addition, the CWA does not require Section 401 certification.

The test the SJC applied in *Warren* was the wrong test and, for that reason, led to the opposite conclusion. The *Warren* court's decision directly conflicts with *Miccosukee*, and should be reversed.

II. What constitutes an "addition" under the CWA is an important question of federal law warranting clarification by this Court; without clarification confusion among the courts and regulatory agencies will persist.

Prior to *Miccosukee*, the U.S. Circuit Courts of Appeals that addressed the issue of whether the mixing of water constitutes an "addition" under the CWA reached different conclusions. While *Miccosukee* addressed this issue and resolved the previous conflicts, the Maine SJC's decision in *Warren* illustrates that uncertainty about how to apply Section 401, and specifically how to identify what qualifies as an "addition," persists. It appears that the SJC erroneously ignored *Miccosukee* because that case was based on Section 402.

This Court can clarify this important issue of federal law by expressly establishing that the test for determining whether the mixing of water constitutes an addition – in the context of both sections 401 and 402 – depends on whether the receiving water and the water being introduced are part of distinct water bodies.

The following summary and comparison of pre-*Miccosukee* decisions and post-*Miccosukee* decisions, including the SJC's decision in *Warren*, reveals that, absent clarification by this Court, the courts and regulatory agencies will continue to misinterpret the applicability of Section 401.

A. An Overview of Pre-*Miccosukee* Case Law

Two of the earlier circuit court cases that addressed the question of what constitutes an addition under the CWA are *National Wildlife Federation v. Gorsuch*, 693 F.2d

156 (D.C. Cir. 1982), and *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). At issue in *Gorsuch* was whether water flowing from a reservoir, through a dam, and into a river constituted an addition. *Gorsuch*, 693 F.2d at 165. In *Consumers Power* the issue was whether water withdrawn from Lake Michigan and later returned to the lake after passing through hydroelectric turbines was an addition. The "returned" water contained both live fish and fish parts as a result of fish that were entrained during withdrawal being chopped up by the turbines when the water flowed back into the lake. *Consumers Power*, 862 F.2d at 581-82.

In both cases the courts upheld EPA's position that for there to be an "addition" something must be introduced into navigable water from the "outside world." *Consumers Power*, 862 F.2d at 584; *Gorsuch*. 693 F.2d at 165. Applying this test, both the D.C. Circuit and the Sixth Circuit concluded that the water flowing through the dam and turbines, respectively, did not constitute an addition. *Consumers Power*, 862 F.2d at 584-86; *Gorsuch*, 693 F.2d at 174-75.

Since *Gorsuch* and *Consumers Power*, other courts similarly have focused on whether the water being introduced is from the outside world when assessing whether an addition has occurred. *Dubois v. Department of Agriculture*, 102 F.3d 1273, 1298-99 (1st Cir. 1996) (finding that a river and pond were *distinct* water bodies and that the pumping of water from the lower elevation river to the higher elevation pond thus was an addition); *Catskill Mountains*, 273 F.3d at 492 (finding that the diversion of water from its natural course, through a tunnel, and into a different creek was an addition, the court stated that no one could reasonably argue that the water being diverted

and the receiving water "are in any sense the 'same,' such that 'addition' of one to the other is a logical impossibility").

In the most recent circuit court decision before *Miccosukee*, however, the D.C. Circuit Court of Appeals strayed from the traditional "outside world" test and focused instead on the rate at which water flows through a dam. Initially, in *North Carolina v. FERC*, 112 F.3d 1175, 1187-88 (D.C. Cir. 1997), the court found that a decrease in the amount of water flowing through a dam was not an addition necessitating state certification. While the *North Carolina* court discussed the rate of flow of water passing through a dam, the D.C. Circuit's decision in that case was consistent with its earlier reasoning in *Gorsuch*, and the reasoning of other Circuit Courts: because nothing was introduced from the outside world, there was no "addition" and hence no "discharge."

In 2003, however, the D.C. Circuit abandoned the outside world test. In *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 297-99 (D.C. Cir. 2003), the court found that an increase in the flow of water through a dam is an "addition" that may result in a discharge under Section 401. While the court stated that its holding was consistent with *North Carolina*, the *Alabama Rivers* decision effectively marked the end of the outside world test, at least in the D.C. Circuit. *Id.* at 298. Although the proposed addition of new turbines to an existing project would not result in the introduction of anything new into the river from the outside world, the court found that a mere increase in flow constituted an addition.

B. The Post-*Miccosukee* Confusion

Although *Miccosukee* should have put this issue to rest by effectively overruling the "increased flow" test used in *Alabama Rivers*, in fact the post-*Miccosukee* cases demonstrate increased confusion. The two pre-*Miccosukee* tests, as discussed above, were (1) the outside world test, and (2) the increased flow test. In the wake of *Miccosukee* two additional tests have been added: (1) *Warren's* private control test, and (2) a new test, enunciated by FERC, that considers whether there has been an "alteration" of the water. *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, ¶ 21 (2005); *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 61,210, ¶ 12 (2004).

Under FERC's new test, even without an increase in the rate of flow or an addition of something from outside the water state certification may be required. Although it applied its own reasoning, FERC joined the SJC in disregarding this Court's *Miccosukee* decision.[3] Under FERC's reasoning, all dams result in a "discharge" requiring certification because all dams "alter" the water in some way from its natural state. *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, ¶ 21 (2005) ("dams and the reservoirs they impound can result in a discharge of water that is warmer or colder, more or less turbid, or containing greater or lesser amounts of dissolved oxygen or sediments").

[3] In *City of Augusta, Georgia*, 109 F.E.R.C. ¶ 62,210, ¶ 11, FERC stated that it did not believe the reasoning in *Miccosukee* was relevant in the context of Section 401. In *FPL Energy Maine Hydro LLC*, 111 F.E.R.C. ¶ 61,104, FERC ignored *Miccosukee* altogether and did not discuss the case.

Thus, there are now four distinct interpretations of what constitutes an "addition" under the CWA from a dam that does not introduce any pollutant into the water:

1. This Court, as well as the First, Second, and Sixth Circuits, ask whether something has been added to the water from a different body of water, *i.e.*, from the outside world.
2. The D.C. Circuit asks whether the rate of flow has been increased.
3. The Maine SJC asks whether a dam exercises "private control" over water.
4. FERC asks whether the water has been "altered" from its natural state.

As discussed above in Section I, the test articulated by this Court in *Miccosukee* – whether the water being mixed is from meaningfully distinct water bodies – applies both in the context of CWA sections 401 and 402. The First, Second, and Sixth circuits' outside world test is consistent with *Miccosukee*, but the other three tests conflict with this Court's reasoning in that case. By clarifying that *Miccosukee* controls in the case at bar, this Court can prevent further confusion about the applicability of Section 401 as it applies to water flowing through dams.

III. The State of Maine's expansive application of Section 401 conflicts with FERC's comprehensive licensing authority over hydroelectric generating projects under the FPA.

The SJC in *Warren* interpreted the applicability of and powers granted to the states under Section 401 of the CWA in a way that conflicts not only with the CWA, but

also with the primary authority granted to FERC to regulate hydropower projects. The SJC's broad interpretation of Section 401 effectively allows the State of Maine to displace FERC as the exclusive authority that licenses hydropower projects. *See, e.g., Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation*, 624 N.E.2d 146, 148 (N.Y. 1993) (the FPA establishes a comprehensive scheme for regulation of hydropower projects, and a state's role under Section 401 is limited to reviewing whether the project meets water quality standards).

The SJC's decision exceeded the scope of the CWA, and hence subverted the FPA, in four ways, as discussed below. Taken together, these four conclusions effectively allow the State of Maine to displace FERC as the primary regulator of hydroelectric facilities in Maine, contrary to the FPA's clear assignment to FERC of that responsibility.

A. The SJC impermissibly broadened the scope of Section 401.

The SJC concluded that the relicensing of a project that authorizes the continued flow of clean water through a dam requires state certification, and the SJC also allowed the inclusion of "reopener" provisions in a certification. As a result, the *Warren* decision effectively opens the door for state control of FERC relicensing proceedings and allows for perpetual state involvement even after a license is issued.

As discussed below, in addition to the impermissible broadening of Section 401 to apply the word "discharge" beyond the addition of something from outside the water body, the SJC also wrongly held that (1) Section 401 requires certification even in the absence of a discharge of

a "pollutant," (2) the continued operation of the Projects will "result in" a discharge even though the discharge (if there were one) already exists, and (3) Section 401(d) authorizes "reopeners" that give the state ongoing regulatory control.

1. Section 401 applies only if there may be a discharge of a pollutant.

The word "discharge" in Section 401 refers only to the discharge of a pollutant, and no such discharge occurs here.[4] The SJC incorrectly concluded that all water flowing through a dam, no matter how clean, constitutes a discharge.

Beginning with the title of the CWA – the "Federal Water Pollution Control Act" – it is clear from the outset that pollution is the *raison d'etre* for the statute. A review of the major substantive provisions of the CWA further demonstrates that the CWA focuses on eliminating or controlling the discharge of pollutants, not on discharges in the abstract.[5]

Section 401 is consistent with the rest of the CWA and focuses on controlling pollutants. That section states that certification is required when a project "may result in any

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[4] The DEP conceded that the operation of these Projects does not result in the discharge of any pollutants. SJC App. tab 25 at 218-228.

[5] *See, e.g.*, 33 U.S.C. § 1251(a) (stating the "national goal" that the discharge of pollutants be eliminated and containing numerous references to the goal of controlling and eliminating pollution); *id.* at § 1252(a) (requiring the EPA to prepare comprehensive programs for preventing, reducing, or eliminating the pollution of navigable waters); *id.* § 1311(a) (prohibiting the "discharge of pollutants" except in compliance with specified provisions).

discharge into navigable waters." 33 U.S.C. § 1341(a)(1). Section 502(16), 33 U.S.C. § 1362(16), recites that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." Reading these provisions together, Section 502(16) provides for the shorthand use of the word "discharge" in lieu of the phrase "discharge of a pollutant" and "discharge of pollutants" (which are separately defined in Section 502(12)).

In stating that the term discharge "includes" the discharge of a pollutant, Congress meant that a discharge *requires* the discharge of a pollutant. The word "discharge" in Section 502(16) is not, despite the SJC's view to the contrary, without limitation. Elsewhere in the CWA, in definitions of the word "discharge," Congress used the phrase "but is not limited to" after the word "includes" when it intended the word "discharge" to encompass more than merely what the statutory section listed. *See, e.g.*, 33 U.S.C. §§ 1321(a)(1) (definition of "discharge" for purposes of that CWA section "includes, but is not limited to"), 1322(a)(9) (same). Congress also used the phrase "but is not limited to" after the word "includes" in another definition in the section of the CWA that applies to Section 401. *Id.* § 1362(14). Congress did *not* do so, however, in the Section 502(16) definition of "discharge." This reflects an indication of Congressional intent to use the word "includes" as a word of limitation, limiting the word "discharge" to a discharge of a pollutant or pollutants.[6]

[6] This interpretation is supported by the statements of several courts that Section 502 does not actually include a "definition" of the word "discharge," but, rather, "provides a statement of inclusion." *See North Carolina*, 112 F.3d at 1187 (D.C. Cir. 1997). *See also PUD #1 of*

(Continued on following page)

2. Continued operation of the Projects will not "result in" a discharge.

Even if the Projects discharged a pollutant into navigable waters, such a discharge would not "result" from licensing authorizing the continued operation of the Projects. These Projects, and the flow of water through them in an "altered" state that is subject to "private control," have existed for many years. *See Warren*, 2005 ME, ¶ 3, App. at A-2. Thus, relicensing of these existing Projects will not "result in" any new discharge. *See North Carolina*, 112 F.3d at 1188 (holding that a water quality certification is not required when a federally-licensed action will not "result in" a new discharge but will only alter a pre-existing discharge; "the word 'result' implies causation. Obviously, a subsequent event cannot be the cause of something that is already in existence" (citation omitted)).

3. Section 401 does not authorize states to include reopeners.

The Certification contains numerous conditions that allow the DEP to "reopen" the FERC license and impose additional or different requirements in the future. Such reopeners exceed the permissible scope of state authority in issuing water quality certifications, and tread on FERC's authority under the FPA.

Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) ("The term 'discharge' is not defined in the CWA"). Logically, a provision that does not "define" a word would not use the word "means."

A water quality certification addresses whether the federally-permitted activity will meet state water quality standards. Once the certification is issued, the state's job is done. Although CWA Section 401(d) allows states to include conditions to ensure that the federally-permitted activity will comply with state water quality standards, those conditions are enforceable by the federal agency, not by the state. *See* 33 U.S.C. § 1341(d), *Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,066 (1996) ("[O]nce a state has issued certification, the Clean Water Act contemplates no further role for the state in the process of issuing, and ensuring compliance with the terms of, a federal license, except in specified circumstances where a new certification is required").

The CWA does not allow states to reopen certifications or impose additional or different conditions after the federal agency has issued its permit. Indeed, Section 401(a)(5) provides that the *federal license* (in this case, the FERC license) for which the certification was issued may be suspended or revoked by the federal agency – not the state – if a judgment is entered that the licensed activity violates specified provisions of the CWA. 33 U.S.C. § 1341(a)(5). Similarly, Section 401(a)(3) allows states to notify federal agencies that they may not rely on a prior certification if circumstances have changed since the state issued that prior certification. *Id.* § 1341(a)(3). This provision does not, however, allow the states to alter or amend the prior certification (and hence the prior federal license).

Given these CWA provisions governing when the license for the certified activity may be revoked, suspended, or altered, and given the complete absence of any provision in Section 401 authorizing states otherwise to

amend their certifications, it is clear that Section 401 was not intended to authorize states to modify a certification once given and once the federal license to which it relates is issued. Nevertheless, the SJC asserted that nothing in the federal law prohibits "reopeners." *Warren*, 2005 ME, ¶ 26, App. at A-14 to -15.

B. The *Warren* court's expansive interpretation of the scope of CWA Section 401 and the powers it grants to the states is inconsistent with the FPA.

The SJC's broad interpretation of Section 401 effectively allows the State of Maine to displace FERC as the exclusive authority that licenses hydropower projects. By interpreting Section 401 to apply to the discharge of clean water that does not contain pollutants, and to the relicensing of projects that already "discharge" that clean water, the SJC has effectively removed all the limitations in Section 401 on the need for hydropower projects to obtain state water quality certification. Further, by allowing "reopener" conditions in certifications the SJC effectively has allowed the DEP to displace FERC as the licensing authority for hydropower projects in Maine. This significant, ongoing regulatory involvement by the State, and the consequent marginalization of FERC's role, conflicts with the FPA and requires correction by this Court.

1. The FPA's Grant of Power to FERC

Section 4(e) of the FPA empowers FERC to license hydropower projects. 16 U.S.C. § 797(e). Section 27 of the FPA establishes the role of states in the licensing process. *Id.* § 821. This section provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested rights acquired therein.

Id.

Focusing largely on the language in sections 4(e) and 27, this Court, in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946), noted that the Federal Power Commission (the predecessor to FERC, *hereinafter* referred to as FERC), save for the specific exceptions carved out in the FPA, is solely responsible for the licensing of hydro projects. *Id.* at 168, 182. *First Iowa* then established that, in general, under the FPA the authority of the federal government supersedes that of state governments. *Id.* at 168. Section 27 saves some authority for the states, but the effect of that section "in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in *irrigation* or for *municipal* or *other uses of the same nature*." *Id.* at 175-76 (emphasis added). By establishing FERC as *the* licensing authority, Congress avoided a system with simultaneous state and federal oversight that would be duplicative and "unworkable." *Id.* at 168.

Since this Court's decision in *First Iowa*, the FPA has been amended to clarify both FERC's and states' roles in the licensing of hydro projects. Specifically, in 1986 Congress updated Section 10(a) of the FPA, the section authorizing FERC to include in its hydropower licenses conditions proposed by the states, to address a project's impacts on fish and wildlife. 16 U.S.C. § 803(a). At the

same time, Congress added Section 10(j), requiring FERC to include in its consideration of a project's impacts on fish and wildlife the recommendations furnished by federal and state environmental agencies. *Id.* § 803(j). However, under Section 10(j) FERC retains discretion with regard to those recommendations.

These amendments reinforce that, even with increased awareness of the significance of environmental issues, FERC remains the sole licensing authority.

Subsequent to the 1986 amendments, in *California v. FERC*, 495 U.S. 490 (1990), this Court reaffirmed its holding in *First Iowa* that the FPA grants FERC exclusive jurisdiction over hydropower project licensing. The SJC's decision in *Warren*, however, threatens FERC's long recognized primacy, creating the very system Congress attempted to avoid and this Court characterized as duplicative and "unworkable." *See First Iowa*, 328 U.S. at 168.

2. The Interplay of the CWA and the FPA

Warren recognizes that in adopting Section 401 of the CWA Congress intended to expand the scope of state involvement in federal licensing proceedings. The SJC, however, has overstepped the limited authority granted to the states by Section 401. Not only did the SJC hold that all dams require state certification, but the SJC allowed the DEP to impose conditions with reopener clauses that would enable the state unilaterally to amend Warren's FERC license and impose new conditions in the future. To allow states the ability, after a FERC license is issued, to make changes in the Section 401 certification, and hence to the FERC license, *American Rivers, Inc. v. FERC*, 129 F.3d 99 (2d Cir. 1997), would conflict with

FERC's determinative role in hydropower licensing proceedings and in enforcing license provisions.[7]

In concluding that nothing in the FPA prohibits the inclusion of reopeners in hydropower licenses the SJC overlooked both the federal-state relationship established by the FPA and the language of FPA Section 6. Section 6 provides in part that "[l]icenses may be . . . altered or surrendered only upon mutual agreement between the licensee and [FERC] after thirty days' public notice." 16 U.S.C. § 799. This restriction on the alteration of a license prevents the unilateral reopening of a license in order to change or implement new license conditions. Nevertheless, it is precisely this power, prohibited by Section 6, that the Maine DEP has sought and that the SJC has wrongly conferred.

In short, the SJC's decision in *Warren* impermissibly invades FERC's exclusive authority to license hydropower projects, expressly granted to FERC by the FPA. In this

[7] *Niagara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation*, 624 N.E.2d 146, 148 (N.Y. 1993) (the FPA establishes a comprehensive scheme for regulation of hydropower projects, and a state's role under Section 401 is limited to reviewing whether the project meets water quality standards); *Bangor Hydro-Electric Co. v. Board of Environmental Protection*, 595 A.2d 438, 443 (Me. 1991) ("In the overlapping schemes of the Federal Power Act and the Federal Water Pollution Control Act, the [BEP]'s veto is confined to the narrow question whether there is reasonable assurance that the Project will comply with state water quality standards") (citations omitted); *Power Auth. of New York v. Williams*, 457 N.E.2d 726, 730 (N.Y. 1984) (certifying agency is limited to determining whether applicable water quality standards are met and is not authorized to engage in a comprehensive environmental review and balancing of interests); *de Rham v. Diamond*, 295 N.E.2d 763, 767-78 (N.Y. 1973) (certifying agency only has authority to determine whether there is reasonable assurance that the activity will not violate water quality standards).

regard, too, this Court's intervention and correction of the SJC's erroneous holding is needed.

CONCLUSION

The Maine SJC's opinion in *Warren* conflicts with this Court's decision in *Miccosukee*, illustrates the confusion among federal and state courts and agencies about when and how to apply Section 401 of the CWA, and expands the states' role so significantly that the State of Maine effectively displaces FERC as the exclusive authority in the licensing of hydropower projects. In reaching its conclusion, the SJC ignored this Court's precedent, misinterpreted the language of the CWA, and failed to acknowledge the conflict of its conclusions with the comprehensive hydropower licensing scheme Congress established in the FPA. The result is confusion about the application of Section 401 and the proper role of states when issuing water quality certifications. Warren asks this Court to grant certiorari so that the Court can clarify this important area of federal law.

Respectfully submitted,

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Reporter of Decisions

MAINE SUPREME JUDICIAL COURT
Decision: 2005 ME 27
Docket: Cum-04-314
Argued: November 16, 2004
Decided: February 15, 2005

Panel: SAUFLEY, C.J., and CLIFFORD, *RUDMAN*, ALEXANDER, CALKINS, and LEVY, JJ.

S.D. WARREN COMPANY

v.

BOARD OF ENVIRONMENTAL PROTECTION

RUDMAN, J.

[¶1] S.D. Warren Company appeals from a judgment entered in the Superior Court (Cumberland County, *Cole, J.*), affirming the decision of the Board of Environmental Protection (BEP) approving Warren's application for water quality certification pursuant to section 401 of the Clean Water Act (CWA) of 1972, 33 U.S.C.A. § 1341 (West 2001), and 38 M.R.S.A. § 464 (2001 & Supp. 2004), subject to certain conditions imposed by the BEP pursuant to section 401(d) of the CWA. 33 U.S.C.A. § 1341(d). Warren asserts that the BEP's order should be reviewed de novo without deference to its legal interpretations; that the BEP exceeded its authority when it found that certification was required under the CWA; and that the BEP exceeded its authority when it imposed the specific conditions that it did. We disagree and affirm the judgment of the Superior Court.

I. BACKGROUND

[¶2] Warren owns and operates five contiguous hydroelectric dam projects on the Presumpscot River in Cumberland County. The waters involved in Warren's projects are variously classified as Class A (from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond), Class B (from its confluence with the Pleasant River to Saccarappa Falls), Class C (from Saccarappa Falls to tidewater), and Class GPA (Dundee Pond). The projects have a combined generating capacity of 7450 kW and provide electricity for Warren's paper mill in Westbrook. The projects operate in the run-of-river mode.[1]

[¶3] All of the projects were constructed in the 1900s. The projects were originally licensed separately between 1979 and 1981. The licenses were to expire in 1999, but were modified in 1996 to continue until 2001. Applications for certification were filed in 1999, subsequently withdrawn and refiled in 2000, 2001, and 2002. In April of 2003 the Department of Environmental Protection (DEP) approved water quality certification for the continued operation of Warren's projects, subject to a number of conditions. In May of 2003 Warren filed a timely appeal from the DEP's decision to the BEP. The BEP adopted the findings of the DEP and affirmed the decision of the DEP in October of 2003. Warren appealed from the decision of the BEP to the Superior Court, which affirmed the decision of the BEP in May of 2004. Warren now appeals from that judgment.

[1] The outflow of the project is approximately equal to the inflow on an instantaneous basis.

II. DISCUSSION

A. Standard of Review

[¶4] We review decisions made by an administrative agency for errors of law, abuse of discretion, or findings of fact not supported by the record.[2] *Melanson v. Sec'y of State*, 2004 ME 127, ¶¶ 7-8, 861 A.2d 641, 643-44. When the Superior Court acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, we review that agency's decision directly. *Id.* "The administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result." *Thacker v. Konover*, 2003 ME 30, ¶ 14, 818 A.2d 1013, 1019 (citations and quotation marks omitted).

B. Deference to BEP

[¶5] Warren asserts that the BEP is not entitled to deference when it interprets the CWA because it is interpreting federal law. We disagree. The BEP is accorded substantial deference when it interprets certain federal statutes. The rationale underlying our deference to BEP interpretations is that the BEP has greater expertise in matters of environmental concern and greater experience

[2] Title 38 M.R.S.A. § 341-D(4)(A) (2001) provides that the BEP is not bound by the findings of fact or conclusions of law made by the DEP, but may adopt, modify, or reverse those findings. In this case, all findings of fact and conclusions of law were initially made by the DEP and subsequently adopted by the BEP. Throughout the rest of this opinion, where findings of fact and conclusions of law are referenced, the reference pertains to the findings of fact and conclusions of law made or adopted by the BEP.

administering and interpreting those particular statutes. *See Maritime Energy v. Fund Ins. Review Bd.*, 2001 ME 45, ¶ 9, 767 A.2d 812, 814. The CWA, 33 U.S.C.A. §§ 1251-1387 (West 2001 & Supp. 2004), concerns the environment and it is an act that the BEP has experience administering. In addition, both state and federal law contemplate that the BEP will administer and interpret section 401 for purposes of water quality certification.[3]

[¶6] Additionally, Warren argues that the BEP is a "lay board" and therefore not entitled to deference. We disagree. We have specifically rejected the proposition that a volunteer board is not entitled to deference. The standard is whether the subject matter is beyond the scope of

[3] Maine law provides:

> (1-A) The department may only issue a waste discharge license pursuant to section 414-A, or *approve a water quality certification pursuant to the United States Clean Water Act, Section 401*. . . .

38 M.R.S.A. § 464(4)(F) (2001) (emphasis added).

Federal law provides:

> (a) Compliance with applicable requirements; application; procedures; license suspension
>
> > (1) Any applicant for a Federal License or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency *a certification from the State in which the discharge originates or will originate,* or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, *that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.*

33 U.S.C.A. § 1341(a)(1) (West 2001) (emphasis added).

the BEP's expertise. *Maritime,* 2001 ME 45, ¶ 9 n.2, 767 A.2d at 814. In *Maritime,* we concluded that because the BEP relied on its expertise interpreting the statute it was charged with administering and relied upon its expertise in a field of environmental concern, the BEP's interpretation was entitled to deference. *Id.*

[¶7] In the present case, because the statutes involved are administered regularly by the BEP and because the subject matter is well within the BEP's expertise, the BEP's interpretations, although not conclusive or binding upon us, are entitled to great deference.

C. State Certification

[¶8] It is the responsibility of the Federal Energy Regulatory Commission (FERC), pursuant to the Federal Power Act (FPA), to issue licenses for the construction, operation, and maintenance of hydroelectric dams located in any body of water over which Congress has jurisdiction pursuant to the Commerce Clause of the United States Constitution.[4] 16 U.S.C.A. § 797(e) (West 2000). Section 401(a)(1) of the CWA, 33 U.S.C.A. § 1341(a)(1), requires an applicant for a federal license or permit to conduct any activity that "may result in any discharge into the navigable waters," to provide the licensing or permitting agency with a certification from the state in which that discharge may occur. The purpose of the certification is to confirm that the contemplated discharge will comply with the water quality standards of the CWA and the effected state. In addition, section 401(d) of the CWA, 33 U.S.C.A. § 1341(d), expressly requires the FERC to incorporate "any

[4] U.S. CONST. art. I, § 8, cl. 3.

other appropriate requirement of State law set forth in such certification" into the license.

[¶9] Warren posits that certification authority has not vested because the operation of its dams does not result in a discharge. We disagree. Certification rights under section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), vest in a state if an activity "'may result in' a discharge." *North Carolina v. FERC,* 112 F.3d 1175, 1188 (D.C. Cir. 1997). Once these certification rights have vested in the state, any conditions that the state imposes become conditions on the federal license. *Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 293 (D.C. Cir. 2003).

[¶10] The term discharge is not expressly defined anywhere in the CWA, however, section 502(16), 33 U.S.C.A. § 1362(16) (West 2001), provides that, "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress." *North Carolina,* 112 F.3d at 1187. The phrases "discharge of pollutant" and "discharge of pollutants" are defined by section 502(12):

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C.A. § 1362(12) (emphasis added).

[¶11] An "addition" is the fundamental characteristic of any discharge. *See North Carolina,* 112 F.3d at 1188 (a

decrease in the volume of water passing through a dam's turbines adds nothing and therefore cannot be a discharge); *Alabama Rivers Alliance,* 325 F.3d at 299 (increased flow resulting from the replacement of dam turbines is an addition and therefore a discharge).

[¶12] The operation of Warren's dams does result in an addition to the waters of the Presumpscot River and therefore a discharge occurs. When a substance is removed from a navigable body of water and then redeposited into that same body of water it constitutes a discharge pursuant to section 502(12), 33 U.S.C.A. § 1362(12). *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 923 (5th Cir. 1983) ("The word 'addition' as used in the definition of the term, 'discharge,' may reasonably be understood to include 'redeposit.'"), *see also Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 947-49 (7th Cir. 2004). *Avoyelles* involved a dispute about whether the removal and redeposit of fill materials in a wetland was a discharge.[5] *Avoyelles Sportsmen's League, Inc.,* 715 F.2d at 900. The court dismissed the idea that the substance discharged must come from the outside world. *Id.* at 924 n.43. "This reading of the definition is consistent with both the purposes and legislative history of the statute. The CWA was designed to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* at 923. When "water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United

[5] The present case does not involve fill material, but it does involve the identical statute defining discharge. 33 U.S.C.A. § 1362(12) (West 2001).

States."[6] *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1297 (1st Cir. 1996). Because these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*. *See id.*

[¶13] Warren is not adding more water to the river. However, a discharge results because Warren's dams remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river. This is a discharge pursuant to section 401(a)(1). 33 U.S.C.A. § 1341(a)(1).

[¶14] Warren argues the word "discharge" is limited to "discharge of pollutant" or "discharge of pollutants." We disagree. "Discharge" has been interpreted broadly. *See Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) ("'Discharge' is the broader term because it includes all releases from point sources, whether polluting or nonpolluting."). It is generally accepted that a dam is a point source. *See Greenfield Mills, Inc.*, 361 F.3d at 947 n.16 ("Here, the artificial mechanism of the dam was used to convey pollutants into the Fawn River, a navigable waterway. Consequently, we believe that the dam constitutes a 'point source.'"). We agree with the holding of *Oregon Natural Desert Ass'n*, 172 F.3d at 1098, that any discharge from a dam, whether polluting or not, is a "discharge" for purposes of section 401(a)(1), 33 U.S.C.A. § 1341(a)(1).

[6] Section 401 of the CWA, 33 U.S.C.A. § 1341, applies to discharges into navigable waters. Navigable waters are defined as the "waters of the United States" at section 502(7), 33 U.S.C.A. § 1362(7).

[¶15] The term "discharge" has been broadly interpreted in the case law because the plain language of section 502, 33 U.S.C.A. § 1362, mandates such an interpretation.

> [W]e look first to the plain meaning of statutory language as a means of effecting legislative intent. Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe to them.

Butterfield v. Norfolk & Dedham Mut. Fire Ins. Co., 2004 ME 124, ¶ 4, 860 A.2d 861, 862 (citations and quotation marks omitted).

[¶16] "Includes" in section 502(16) must be given its plain meaning. The common definition of the word *includes* does not suggest it is a word of limitation. In order for *includes* to operate as a word of limitation it would have to be treated as a synonym for the word *means*.[7] Section 502, 33 U.S.C.A. § 1362, contains the definition of twenty-three different terms and phrases occurring within the CWA. Of those twenty-three definitions, twenty-two of them use the word *means;* only one of them, "discharge," uses *includes*.

[7] The U.S. Supreme Court considered the distinction between the words *includes* and *means*, outside of the CWA context, in *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 n.1 (1934):

> [T]he natural distinction would be that where "means" is employed, the term and its definition are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition.

> The argument goes that unless we presume that Congress's use of the term "includes" was the result of careless drafting, it seems that Congress intentionally left the definition of discharge open. . . . Arguably, to give "includes" the same meaning as "means" not only confuses the English language, but also makes a mockery of careful legislative drafting.

Alia S. Miles, Comment, *Searching For The Definition Of "Discharge": Section 401 Of The Clean Water Act,* 28 ENVTL. L. 191, 213 (1998).

[¶17] Accordingly, water that has left its natural state and has been subjected to man-made control constitutes an "addition" upon its return to the same navigable waterway. Any addition to water is fundamental to the definition of the term "discharge." Therefore, the water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section 1341.

D. BEP's Authority Under Maine and Federal Law

[¶18] Warren argues that the BEP exceeded its authority under federal and state law because it imposed conditions that seek to enhance water quality, conditions that were not properly adopted through rule-making, conditions that require an unauthorized dissolved oxygen criterion, and conditions that are subject to reopening. We disagree.

[¶19] The conditions do not exceed BEP authority. Because water quality standards are not presently being met, the BEP may impose any conditions necessary to ensure compliance with those standards. *See PUD 1 of*

Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 715 (1994); *Bangor Hydro-Elec. Co. v. Bd. of Envtl. Prot.,* 595 A.2d 438, 442 (Me. 1991); 38 M.R.S.A § 464(1) (2001).

[¶20] States are authorized to establish water quality standards pursuant to section 303. 33 U.S.C.A. § 1313 (West 2001). "Those standards shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *PUD 1,* 511 U.S. at 714. Pursuant to section 401(d), 33 U.S.C.A. § 1341(d), a state may require that applicants for federal permits or licenses comply with both the designated uses and water quality criteria of the state standards established under section 303. 33 U.S.C.A. § 1313.[8] *PUD 1,* 511 U.S. at 715. A state may, in its certification, include conditions necessary to ensure that the applicant will comply with state water quality standards established pursuant to section 303, 33 U.S.C.A. § 1313, and any other appropriate requirement of state law.[9] *Id.*

[¶21] Maine's law is settled in this area. In *Bangor Hydro-Electric Co.,* 595 A.2d at 442 n.4, we concluded that narrative criteria at 38 M.R.S.A. § 465 (2001 & Supp.

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[8] Even though section 303, 33 U.S.C.A. § 1313, is not specifically mentioned in section 401(d), 33 U.S.C.A. § 1341(d), it is incorporated by reference in section 301, 33 U.S.C.A. § 1311 (West 2001), which is specifically mentioned. "Section 303 is always included by reference where section 301 is listed." *PUD 1 of Jefferson County v. Wash. Dep't of Ecology,* 511 U.S. 700, 713 (1994) (citations omitted).

[9] Justice Stevens, in his brief concurrence, was particularly persuaded that states were not restricted in their regulation pursuant to section 401(d), 33 U.S.C.A. § 1341(d), "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require." *PUD 1,* 511 U.S. at 723.

2004), which requires waters "of sufficient quality to support all indigenous fish species," was intended to be an integral part of the water quality standards for the BEP to consider. We also concluded, based upon the specificity of the designated uses at 38 M.R.S.A. § 465, that the Legislature's purpose for the language "suitable for the designated uses" was "that the designated uses actually be present." *Id.* at 442. We stated that when those uses are not presently being achieved, the Legislature intended the quality of the water be enhanced so that the uses are achieved. *Id.*

[¶22] Whether compliance has been achieved and whether the conditions imposed are necessary to ensure future compliance are factual determinations to be made by the BEP. The BEP found that the involved waters were not presently in compliance with the state water quality standards, and that the conditions imposed were necessary to ensure future compliance with Maine's water quality standards. Warren has not sufficiently challenged those factual determinations.[10]

[¶23] Warren argues that the BEP exceeded its authority by including "reopeners" in its certification. We

[10] Warren repeatedly asserts that alternative conclusions could be drawn from certain portions of the record. However, because the Board's findings of fact are reviewed for clear error, whether alternative conclusions could be drawn is not determinative. We do not substitute our judgment for that of an agency on questions of fact provided that the record substantially supports those facts. *See Int'l Paper Co. v. Bd. of Envtl. Prot.*, 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054; 5 M.R.S.A. § 11007(3) (2002). The Board's findings of fact must be upheld, unless Warren can show that those findings are clearly erroneous. *See Bangor Hydro-Elec. Co. v. Pub. Utils. Comm'n*, 589 A.2d 38, 40 (Me. 1991). Warren has not argued on appeal that the record does not substantially support the BEP's factual determinations.

disagree. The BEP included conditions in its certification that permit the certification to be reopened and the conditions amended following notice and hearing. The inclusion of these "reopeners" is permissible under both state and federal law.

[¶24] The U.S. Supreme Court has interpreted section 401(d), 33 U.S.C.A. § 1341(d), broadly to mean that a state may attach *any* conditions that are necessary to ensure compliance with section 303, 33 U.S.C.A. § 1313, limitations and are appropriate under state law. *PUD 1,* 511 U.S. at 713. The "reopeners" were included as a precaution in case the conditions instituted are not sufficient to ensure compliance with state water quality standards and section 303, 33 U.S.C.A. § 1313, limitations. These "reopeners" fit within both the literal language of section 401(d), 33 U.S.C.A. § 1341(d), and the statutory interpretation of the U.S. Supreme Court. *See PUD 1,* 511 U.S. at 713.

[¶25] In *PUD 1,* the court addressed certification conditions generally and not "reopeners" specifically. In *American Rivers, Inc. v. FERC,* 129 F.3d 99 (2d Cir. 1997) "reopeners" were specifically addressed. The position of the FERC, opposing the inclusion of "reopeners," was recited in the court's opinion:

> The Commission primarily fears that "to accept the conditions proposed would give the state the kind of governance and enforcement authority that is critical and exclusive to the Commission's responsibility to administer a license under the Federal Power Act, a power the Courts have repeatedly concluded belongs exclusively to the Commission."

Am. Rivers, 129 F.3d at 111 (quoting FERC's brief).

In response, building upon the holding in *PUD 1*, the court held:

> We have no quarrel with the Commission's assertion that the FPA represents a congressional intention to establish a broad federal role in the development and licensing of hydroelectric power. Nor do we dispute that the FPA has a wide preemptive reach. The CWA, however, has diminished this preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions.

Am. Rivers, 129 F.3d at 111 (citations and quotation marks omitted).

[¶26] The court explained that, even though this result seems to subject the FPA to the whims of the states, the FERC always has the power not to grant the licenses at all. *Id.* While this may occasionally produce harsh results, particularly if construction has already begun, there is no federal statutory authority supporting FERC's position that the FPA prohibits the inclusion of "reopeners." *Id.*

> The Second Circuit's decision, unanimously vacating FERC's orders, is significant for several reasons. First, the decision denied FERC's authority to review or reject Section 401 conditions and required the agency to include conditions in its licenses, thereby enabling states to influence the content of the licenses. *Second, it allowed states to affect licenses already issued by FERC by recognizing the validity of state certification conditions requiring ongoing state review and approval of project changes.* Third, and most important, *American Rivers I* implemented Congress' intent in the CWA to diminish FERC's role as an exclusive hydropower decision-maker by authorizing other resource agencies to condition FERC licenses through statutory provisions like Section 401.

Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism,* 26 COLUM. J. ENVTL. L. 81, 106 (2001) (emphasis added).

[¶27] Nor does the inclusion of "reopeners" violate Maine law. Under Maine law the BEP has the authority to do that which it is granted authority to do, either expressly or by implication when that authority is essential to the full exercise of its powers specifically granted.

> [P]ublic bodies . . . may exercise only that power which is conferred upon them by law. The source of that authority must be found in the enabling statute either expressly or by necessary inference as an incidence essential to the full exercise of powers specifically granted.

Hallissey v. Sch. Admin. Dist. No. 77, 2000 ME 143, ¶ 11, 755 A.2d 1068, 1072.

[¶28] The BEP is expressly granted the authority to issue section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), certifications pursuant to 38 M.R.S.A. § 464(4)(F)(1-A). Considering the purpose of Maine's water quality standards, stated at 38 M.R.S.A. § 464(1),[11] the authority to include "reopeners" is "essential to the full exercise of powers specifically granted" to the BEP. *See Hallissey,* 2000 ME 143, ¶ 11, 755 A.2d at 1072. This authority is essential because if the

[11] It is the State's objective to "restore and maintain the chemical, physical and biological integrity of the State's waters . . . " 38 M.R.S.A. § 464(1).

conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters . . . " will not be achieved during the forty-year term of the FERC license.[12] The Board's interpretation of 38 M.R.S.A. § 464 as implicitly authorizing the inclusion of "reopeners" is reasonable and the statute does not plainly compel a contrary result.[13]

[¶29] Warren argues that the BEP applied an impermissible dissolved oxygen criteria to its certification. We disagree. This is purely an issue of statutory interpretation. The water quality standards at 38 M.R.S.A. § 465(3)(B) are regularly administered by the BEP and as stated previously are entitled to great deference. *See Thacker,* 2003 ME 30, ¶ 14, 818 A.2d at 1019. The water quality standards at 38 M.R.S.A. § 465(3)(B) are ambiguous as to whether an instantaneous standard is required. If the statute is ambiguous, courts review whether the agency's construction is reasonable. Courts do not "second-guess" an agency on issues within its area of expertise; rather, courts review only to ascertain whether its conclusions are "unreasonable, unjust, or unlawful." *See Town of Eagle Lake v. Comm'r, Dep't of Educ.,* 2003 ME 37, ¶ 5, 818 A.2d 1034, 1037. It does not matter whether an alternative interpretation would also have been reasonable, only that

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[12] The FERC license sought by Warren is to last forty years.

[13] As stated previously,

> [t]he administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result.

Thacker v. Konover, 2003 ME 30, ¶ 14, 818 A.2d 1013, 1019 (citations and quotation marks omitted).

the interpretation adopted by the BEP was not unreasonable, unjust or unlawful. Given the purpose of Maine's water quality standards, the BEP's interpretation does not appear unreasonable, unjust, or unlawful.

[¶30] Finally, Warren argues that the BEP adopted a policy that constituted impermissible rule-making. We disagree. The BEP based its determinations of flow levels in the bypass reach sections on a case-by-case basis. The case-by-case determinations made by the BEP do not constitute impermissible rule-making. Not every decision made by an agency constitutes "rule making" despite the fact that many decisions seem, to some extent, legislative in character. *See Fryeburg Health Care Ctr. v. Dep't of Human Servs.,* 1999 ME 122, ¶ 9, 734 A.2d 1141, 1144 ("[A]n agency is not required to use the formal rule making procedures every time it makes a decision interpreting an existing rule."); *Mitchell v. Me. Harness Racing Comm'n,* 662 A.2d 924, 926-27 (Me. 1995) (an agency's interpretation of the statutes it is charged with enforcing does not amount to rule-making).

E. Conclusion

[¶31] In conclusion, the BEP's interpretation of statutes regularly administered by it are entitled to great deference; the BEP's determination that CWA certification rights had vested in the state was not unreasonable; and

finally, the BEP did not exceed its authority under federal or Maine law.

The entry is:

Judgment affirmed.

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STATE OF MAINE
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SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-03-70

S.D. WARREN COMPANY,

Petitioner

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent

ORDER

Before this court is Petitioner, S.D. Warren Company's ("Warren") appeal from the October 2, 2003, decision of Respondent, Maine Board of Environmental Protection ("BEP"), pursuant to M.R. Civ. P. 80C.

FACTS

Petitioner Warren owns and operates the Dundee, Gambo, Little Falls, Mallison Falls and Saccarappa hydroelectric generating dam projects (the "Projects") located on the Presumpscot River. "The Projects have a combined generating capacity of 7,450 kW and are operated to provide electricity to Petitioner Warren's Westbrook paper mill." (R. 278 at 1.) The Projects are operated in the "run-of-river" mode, meaning that outflow from each Project is approximately equal to inflow on an instantaneous basis during normal operating conditions. (R. 259 at 3.)

All of the Projects were constructed in the 1900s and were originally licensed by the Federal Energy Regulatory

Commission ("FERC") in separate actions between October 31, 1979 and September 17, 1981. *Id.* The original expiration dates for these licenses ranged from October 1, 1999 to September 1, 2001. Accordingly, in 1996, at Petitioner Warren's request, the licenses were modified to all expire on January 26, 2001.

On January 14, 1999, Petitioner Warren field [sic] applications for the continued operation of each of the Projects. Certification was also requested in conjunction with Petitioner Warren's Application with FERC for each of the Projects. The applications for certification were subsequently withdrawn and submitted again on January 12, 2000, January 11, 2001, and December 20, 2002. (R. 178-181.)

The Department of Environmental Protection ("DEP") issued its Order in April 2003, approving the applications of Petitioner Warren and granting certification subject to several conditions.[1] Consequently, Petitioner Warren appealed the Order to the BEP on May 29, 2003. Five months later, the BEP denied Petitioner Warren's appeal. Therefore, on October 31, 2003, Petitioner Warren filed this appeal with the Cumberland County Superior Court,

[1] These conditions included restrictions on water levels and flows, requirements that Petitioner Warren avoid maintenance drawdowns of project impoundments during May and June, install upstream eel passage facilities within two years following the issuance of the FERC license, institute operation measures to provide downstream eel passage, install and operate upstream and downstream anadromous fish passage facilities, institute spillage of 50 cfs at the Dundee Dam and 100 cfs at the Gambo Dam in order to meet Class B dissolved oxygen ("DO") standards in the river, and develop and implement a recreational facility enhancement plan for each project. (R. 278.)

pursuant to M.R. Civ. P. 80C.[2] Subsequently, on January 26, 2004, this court granted American Rivers and Friends of the Presumpscot River's Motion to Intervene.

DISCUSSION

A. Standard of Review

Petitioner Warren argues that this court should review the decision of the BEP *de novo*. Conversely, however, the BEP asserts that its decision should be given deference appropriate to its professional and technical expertise.

When a decision of an administrative agency is appealed pursuant to M.R. Civ. P. 80C, this court reviews "the agency's decision directly for abuse of discretion, errors of law, or findings not supported by the evidence." *Centamore v. Dep't of Human Services,* 664 A.2d 369, 370 (Me. 1995) (citation omitted). The focus of the appeal is not whether the court would have reached the same conclusion as the agency, but whether the record contains competent and substantial evidence, which supports the result, reached by the agency. *CWCO, Inc. v. Superintendent of Ins.*, 1997 ME 226, ¶ 6, 703 A.2d 1258, 1261. Deferential

[2] In footnote three in Petitioner Warren's reply brief, it requests that this court modify the record to include the audiotape of this hearing pursuant to M.R. Civ. P. 80C(f). The tapes in question, however, are not required to be kept and contain thoughts of BEP members that would not be necessary to complete the record in this case. Therefore, this court denies Petitioner Warren's motion to modify and grants the BEP's motion to strike footnote 3. *See Murphy v. Board of Environmental Protection,* 615 A.2d 255, 260 (holding that "[t]he Administrative Procedure Act leaves it to the discretion of the trial court to determine whether additional evidence is necessary to complete the record.").

review requires this court to uphold the orders of the BEP if they are based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Maine Clean Fuels, Inc.,* 310 A.2d 736, 741 (Me. 1973).

Here, the BEP is a volunteer board. Despite this, however, the DEP and the BEP regularly administer the laws in question. Consequently, this court will not "attempt to second-guess the agency on matters falling within its realm of expertise and [instead will] limit our review to determining whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." *Imagineering v. Department of Professional & Financial Regulation,* 593 A.2d 1050, 1053 (Me. 1991); *Isis Development, LLC. V. Town of Wells,* 2003 ME 149, ¶ 3, n. 4, 836 A.2d 1285. Accordingly, it is necessary for this court to deferentially review the BEP's decision in this case.

B. Does the Clean Water Act Require Certification?

Petitioner Warren contends that the BEP's decision, holding that the Projects require water quality certification under the Clean Water Act ("CWA"), was in error.

The CWA provides, in part that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originate or will originate . . . " 33 U.S.C. § 1341(a)(1) (2004). "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants. *Id.* at § 1362(16).

The D.C. Circuit has determined that the term "discharge" contemplates the addition of something to the water source. *North Carolina v. FERC,* 112 F.3d 1175, 1187 (D.C. Cir. 1997);[3] *Alabama Rivers Alliance v. FERC,* 325 F.3d 290 (D.C. Cir. 2003) (holding that certification was required when replacement of several turbines resulted in an increased flow of water through a dam.) In addition, the Supreme Court has held that once the certification requirement is triggered by a "discharge" then the certification conditions are not limited to addressing merely the physical quality of the water, but can also require implementation of state water quality standards under the expansive language of § 401(d). *PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700, 711 (1994).

In the case at bar, the "run-of-river" operation will be maintained at each Project site. (R. 277 at 91-93.) The Projects, however, will require the rerouting of the natural flow of the river. This court finds that this rerouting of the water constitutes a "discharge" under the CWA. *See PUD No. 1,* 511 U.S. at 711.

Next, Petitioner Warren argues that even if a "discharge" does occur it will not contain pollutants, therefore no certification is required under the CWA. Although not binding on this court, this court finds the decisions of sister states on this issue to be instructive and, in this case, persuasive.

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[3] This court notes that the D.C. Circuit Court addressed whether a mid-term license amendment request triggered Section 401 certification by a bordering state, which is an entirely different issue than the one presented in this case. *See North Carolina,* 112 F.3d at 1176.

The Ninth Circuit Court of Appeals has held that:

> [d]ischarge is the broader term because it includes all releases from point sources, whether polluting or nonpolluting. The D.C. Circuit reached this conclusion in *National Wildlife Fed'n v. Gorusch,* 224 U.S. App. D.C. 41, 693 F.2d 156 (D.C. Cir. 1982). There the court interpreted discharge in section 1362(16) of the Act to include the release from a point source of turbid water that did not contain any pollutant. This is the logical interpretation of § 1362(16) that comports with the structure and lexicon of the Clean Water Act.

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1098 (9th Cir. 1998), *cert. denied,* 528 U.S. 964 (1999). In addition, the Supreme Court of New York has held that:

> [t]his broad definition of the word "discharge" and its application to "any discharge" in section 401 of the FWPCA requires that we reject petitioner's fundamental argument, i.e., that for section 401 to apply, a discharge must contain a specific and identifiable pollutant. In rejecting that argument, we further note that such an interpretation advances the FWPCA's purpose of insuring the rights of States to eliminate conditions of pollution (see U.S. Code, tit 33, § 1251, subd [b]), including pollution arising from causes other than specific discharges of identifiable pollutants (see US Code, tit 33, § 1314, subd [f], par [2]). para.)

Power Auth. v. Williams, 475 N.Y.S.2d 901, 904 (1984). Therefore, this court finds that certification is required by the CWA, despite the possible nonexistence of pollutants in the "discharge."

Finally, Petitioner Warren opines that even if the Projects will result in a discharge of a pollutant, the "discharge" will not result from the continued operation of the Projects, so certification is not required. The CWA, however, provides that any applicant for a license, which would result in "any discharge," needs to obtain water quality certification. Here, a "discharge" will occur, despite the continued operation of the Projects. Hence, this court finds the BEP's decision, requiring Petitioner Warren to obtain water quality certification, correct as a matter of law.

C. Certification Conditions

The water quality certification in question requires that the Projects maintain seasonally varied minimum flows, install upstream and downstream eel passage, install fish passage facilities, and develop and implement a recreational facility enhancement plan for each project. Petitioner Warren asserts that all of these requirements are void, because the BEP cannot impose conditions to enhance or expand the size of the aquatic habitat. Petitioner Warren also contends that as long as some part of the water attains or supports the designated uses, the water quality standard is being met.

The CWA requires States that issue water quality certifications to impose "limitations" necessary to assure compliance with the State's water quality standards. 33 U.S.C. § 1341(d) (2003). The Law Court has held that when issuing a water quality certification, the State must determine whether all three parts of the Maine water quality standards are met; the designated uses, the numerical criteria for water chemistry and the narrative

criteria. *Bangor Hydro-Electric Co. v. Board of Environmental Protection,* 595 A.2d 438, 442 (Me. 1991). Where water quality standards are not being met, the designated uses "provide goals for states management of its classified waters." *Id.* Furthermore, conditions requiring fish passage and recreational facilities to be installed "clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat." *Id.* at 433.

1. Bypass Reach Minimum Flows

The Maine Water Classification Program provides that "[t]he Legislature intends by passage of this article to establish a water quality classification system which will allow the State to manage its surface waters so as to protect the quality of those waters and, where water quality standards are not being achieved, to *enhance* water quality." 38 M.R.S. § 464(1) (2003) (emphasis added).

Here, the BEP held that increased flows in the bypass reach are necessary to provide reasonable assurance that the waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community. (R. 278 at 6-7.) There is ample evidence in the record to support the BEP's finding that the DEP had authority to restore the previously expired fish species and increase the population and habitat of the existing species. (R. 259); (R. 136 at 70.) Accordingly, based on a totality of the circumstances, this court finds that the BEP's conclusions regarding minimum flows are not clearly erroneous. *See Bangor Hydro-Electric Co.,* 595 A.2d at 442-43 (holding that "[t]he designated uses provide goals for the state's management of its classified waters. We hold that it is proper for the Board

to consider such goals in reviewing a forty year license for compliance with the classification standards . . . "); *PUD No. 1,* 511 U.S. 700 (upholding state water quality certification requirement that a dam owner provide minimum flows to protect fish in the bypass).

2. Upstream and Downstream Eel Passage

The Law Court has held that fish passage measures contained in a certification for the relicensing of a hydroelectric project, "clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat." *Bangor Hydro-Electric Co.,* 595 A .2d at 443.

In this case, the BEP found that the upstream and downstream eel passage conditions were "necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order." (R. 278 at 7.) This court finds that the upstream and downstream eel requirements are supported by substantial evidence in the record. Specifically, the DEP found that while there is evidence that "eel migration and thus overall eel populations would benefit from the installation of upstream passage facilities at each dam, because more eels will successfully pass the dams to reach Sebago Lake with fishways in place than without fishways." (R. 259 at 17-18.) Also, there exists substantial evidence in the record that the dams are affecting the downstream eel passage as well. (R. 174 at 94-98.) Therefore, this court concludes that the BEP's conclusions are based on adequate evidence and are not an abuse of discretion.

3. Fish Passage

"The Legislature declares that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters." 38 M.R.S. § 464(1) (2003). "The Legislature further declares that in order to achieve this objective the State's goals are: [t]hat water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water." *Id.* at § 464(1)(C). In addition, Class B and C waters are required to be of such quality that they are suitable "as a habitat for fish and other aquatic life." *Id.* at §§ 465(3)(A) and (4)(A). Class B and C waters also must "be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community." *Id.* at §§ 465(3)(C) and 4(C).

Here, the record supports the BEP's finding that "phased installation of upstream and downstream anadromous fish passage facilities at each of the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters . . . " (R. 278 at 7); (R. 259 at 10-11.) Consequently, this court finds that the BEP's condition regarding fish passage was not clearly erroneous, since "all aquatic species indigenous to the receiving water" should be supported. 38 M.R.S.A. § 465(3)(C) (2003); *Bangor Hydro-Electric Co.*, 595 A.2d at 433.

4. Recreational Facilities

Class B and C waters "shall be of such quality that they are suitable for the designated uses of . . . recreation in and on the water." 38 M.R.S. §§ 465(3)(A) and (4)(A) (2003). In this case, the record adequately supports this determination. (R. 259 at 24-25.) More specifically, the BEP correctly found that Petitioner Warren's dams have eliminated the opportunity for fishing and prevented recreational access in the areas of the river. (R. 278 at 7-9.) Accordingly, this court concludes that the BEP's decision was not erroneous or an abuse of discretion. *See Bangor Hydro-Electric Co.*, 595 A.2d at 442.

D. Antidegradation Policy

Next, Petitioner Warren asserts that the BEP violated the State's antidegradation policy by failing to consider and address the impact of these above conditions on the use of hydroelectric power generation.

"Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected." 38 M.R.S. § 464(4)(F)(1) (2003). The BEP has broad latitude to place restrictions on Warren's licensed activity to assure compliance with state water quality standards and any other appropriate requirement of state law. *PUD No. 1,* 511 U.S. at 715; 33 U.S.C. § 1341(d) (2003).

In the case at bar, the Order provides that the minimum bypass flows, spillage flows and fish passage facilities required by the Order will reduce average annual generation from 40.5 million to 34.5 million kWh. (R. 259 at 27.) Even though hydropower generation will be

reduced, this court finds that it will still be "maintained and protected" as required by the state's antidegradation policy. Furthermore, this court notes that hydropower is just one of the many designated and existing uses that must be protected in the subject waters. 38 M.R.S. § 464(4)(F) (2003). Thus, this court finds that this slight reduction in the average generation will not violate the state's antidegradation policy.

E. Rulemaking

Petitioner Warren also asserts that the BEP's reliance on the Bureau of Land and Water Quality's Hydropower Project Flow and Water Level Policy, absent rulemaking, ("Water Level Policy") was inappropriate.

> Rule means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

5 M.R.S. § 8002(9) (2003). "The term does not include [a]ny form, instruction or explanatory statement of policy which in itself is not judicial enforceable, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges." *Id.* at § 8002(9)(B)(4). The Law Court has held that "[a]n agency may provide guidance for its employees and the public without adopting the guiding materials as rules, as long as those materials are not intended to have, and are not given, the force and effect of law. *Downeast Energy*

Corporation v. Fund Insurance Review Board, 2000 ME 151, ¶ 23, 756 A.2d 948, 953.

Here, the policy provides that:

> In determining flows and water levels at hydropower projects, the Bureau of Land and Water Quality will operate under the rebuttable presumption that a flow providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of the affected river or stream, as measured from bank full conditions, or a water level that provides wetted conditions for 3/4ths of the littoral zone of a lake or pond, as measured from full pond conditions, will be needed to meet aquatic life and habitat standards.

(R. 218.) Although the DEP may have used this presumption in making its conclusions, the BEP determined that "the Department did not base its minimum flow determinations on meeting a wetted width requirement . . . " (R. 278 at 12.) This analysis is supported by substantial evidence in the record, because the DEP did not *require* the rewatering of 3/4ths of the width of the bypass channels in its decision. (R. 259 at 19-21.) Instead, the DEP considered many circumstances and established minimum flows for each project on a "case-by-case basis." *Id.* at 19; (R. 278 at 12.) Consequently, based on this analysis as well as 5 M.R.S.A. § 8002(9)(B)(4), this court finds that the BEP's decision was not clearly erroneous.

F. Dissolved Oxygen Criterion

Petitioner Warren further argues that the BEP erred in upholding the instantaneous dissolved oxygen ("DO") criterion. Specifically, Petitioner Warren contends the

numeric water quality standard for DO contained in 38 M.R.S.A. § 465(3)(B) should be interpreted as requiring a calculation based on a daily average not an instantaneous measurement.

"To determine the intent of the Legislature, we look first to the statute's plain meaning and, if there is ambiguity, we look beyond that language to the legislative history. . . . " *Town of Eagle Lake v. Commissioner, Department of Education,* 2003 ME 37, ¶ 7, 818 A.2d 1034, 1037 (citation and quotations omitted). "When interpreting statutes, the Court seeks to discern from the plain language the real purpose of the legislation, avoiding results that are absurd, inconsistent, unreasonable, or illogical." *Id.* (quotations and citations omitted). "Further, we consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Id.* (citations and quotations omitted).

In the present case, the statute provides, that the DO content "shall not be less than 7 parts per million or 75% of saturation, whichever is higher . . . " 38 M.R.S. § 465(3)(B) (2003). This court finds that this language is ambiguous as to whether or not this standard applies instantaneously or based on an average through out any given day. Accordingly, it is necessary to review the legislative history of this section.

Before 1973, the Maine Water Quality Law required that the DO content in Class B waters be not less than 75% of saturation and not less than 5 parts per million "at any time." (P.L. 1967, c. 475 § 4.) In 1973, however, the Legislature removed the words "at any time" from the standard. (P.L. 1973, c. 450 § 5.)

Despite this, however, reading the statute as requiring an "average" standard would lead to an unreasonable result. This is because, as the BEP found, "oxygen levels could in fact fall below the instantaneous minimum threshold of 5 parts per million needed to sustain fish for substantial periods of time during a given day, so long as the daily average DO level was 7 parts per million." (R. 278 at 114.); *Town of Eagle Lake,* 2003 ME 37, ¶ 7, 818 A.2d at 1037 (holding that the court should avoid absurd, inconsistent, unreasonable as well as illogical results.) Consequently, this court finds that the BEP's decision regarding the DO content was correct as a matter of law.

G. Re-Opener Provisions

Petitioner Warren argues that the re-opener provisions contained in the BEP's decision are void.

The CWA provides that any certification "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply" with the State's water quality standards. 33 U.S.C. § 1341(d) (2003). Moreover, the Second Circuit Court of Appeals has held that FERC did not have authority to reject state-imposed water quality certification conditions, including a broadly worded re-opener clause. *American Rivers v. FERC,* 129 F.3d 99, 111 (2nd Cir. 1997). In fact, FERC itself has taken the position that based on *American Rivers,* "a state may modify a water quality certification when the state has reserved such authority in the certification." *Central Maine Power Co.,* 82 FERC 61,191 at 61,733 (February 26, 1998).

In the case at bar, the re-opener provisions contained in the DEP's decision are specific and are necessary to ensure that the state's water quality standards are met. In addition, the re-opener provisions allow for Petitioner Warren to receive notice and a hearing regarding any project modifications as well as an opportunity to appeal the final decision to the courts. (R. 278 at 19.) In sum, this court finds that the BEP's inclusion of these specific re-opener provisions was not clearly erroneous.

WHEREFORE, this court **DENIES** Petitioner Warren's appeal and **AFFIRMS** the decision of the BEP, pursuant to M.R. Civ. P. 80C.

Dated: May 4, 2004

/s/ Roland A. Cole
Roland A. Cole
Justice, Superior Court

[LOGO] STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

BOARD ORDER

IN THE MATTER OF

S.D. WARREN COMPANY	)	WATER QUALITY
Gorham, Windham, and Westbrook	)	CERTIFICATION
Cumberland County	)	
PRESUMPSCOT RIVER	)	
HYDRO PROJECTS	)	
#L-19713-33-E-N (Dundee)	)	
#L-19714-33-E-N (Gambo)	)	
#L-19715-33-E-N (Little Falls)	)	FINDINGS OF FACT
#L-19716-33-E-N (Mallison Falls)	)	AND ORDER
#L-19717-33-E-N (Saccarappa)	)	ON APPEAL

Pursuant to the provisions of 38 MRSA Section 341-D and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection has considered the appeal of S.D. WARREN COMPANY of the Department's approval of Warren's application for water quality certification for the continued operation of the Presumpscot River Hydro Projects. Based on a review of the materials submitted by the appellant and other interested parties, and a review of the application with its supportive data, agency review comments, and other related materials on file, the Board FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY

The Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa Hydroelectric Projects (collectively, the Presumpscot River Projects) consist of five contiguous dams, impoundments, powerhouses, and appurtenant

facilities located on the Presumpscot River in the Towns of Gorham and Windham and the City of Westbrook, Cumberland County, Maine. The projects have a combined generating capacity of 7,450 kW and are operated to provide electricity to S.D. Warren's Westbrook paper mill.

The projects were originally licensed by the Federal Energy Regulatory Commission (FERC) in separate actions between October 31, 1979 and September 17, 1981. The original expiration dates for these licenses ranged from October 1, 1999 to September 1, 2001. In 1996, at S.D. Warren's request, the licenses were modified to all expire on January 26, 2001, in order to facilitate a coordinated review at relicensing.

On January 14, 1999, S.D. Warren filed applications with the Department for Water Quality Certification for the continued operation of each of the Presumpscot River Projects. Certification was requested in conjunction with S.D. Warren's Application for Subsequent License with the FERC for each of the projects. The applications for certification were subsequently withdrawn and refiled on January 12, 2000, January 11, 2001, and December 20, 2002.

By Order #L-19713-33-E-N, #L-19714-33-E-N, #L-19715-33-E-N, #L-19716-33-E-N, and #L-19717-33-E-N dated April 30, 2003, the Department approved water quality certification for the continued operation of the Presumpscot River Projects subject to a number of conditions. In brief, these conditions require that:

- All projects will be operated in a run-of-river mode with maximum 1-foot impoundment fluctuations and with specified minimum flows into the bypass reach at each dam;
- Maintenance drawdowns will be avoided during May and June;

- Upstream eel passage facilities will be installed at all projects within 2 years of issuance of a new FERC license;
- Upon license issuance, operational measures (including generation shutdown for at least 4 hours per night for at least 4 weeks each year) will be instituted at all projects to provide downstream eel passage;
- Specified upstream and downstream anadromous fish passage facilities will be installed and operational at all projects in phases, beginning with the installation of passage facilities at the Saccarappa Project, to be operational no later than 2 years after passage is available at the downstream Cumberland Falls Dam;
- Upon license issuance, spillage of water or other equivalent measures will be instituted at Dundee Dam and Gambo Dam in order to meet Class B dissolved oxygen standards in the river; and
- A Recreational Facility Enhancement Plan will be developed and implemented for each project.

On May 30, 2003, S.D. Warren filed a timely appeal of the Department's action.

On June 30, 2003, timely responses to the appeal were filed by Friends of Sebago Lake, American Rivers and Friends of the Presumpscot River.

2. APPLICABLE STANDARDS FOR APPEAL

38 MRSA Section 341-D(4) provides that the Board is not bound by the Commissioner's findings of fact or conclusions of law but may adopt, modify or reserve findings of fact or conclusions of law established by the Commissioner. Any changes made by the Board must be based upon the Board's review of the record,

any supplemental evidence admitted by the Board and any hearing held by the Board.

Section 24.B(2) of the Department's Chapter 2 Rules provides that the written notice of appeal must include, but need not be limited to, evidence demonstrating the appellant's standing as an aggrieved person, the findings, conclusions or conditions objected to or believed to be in error, the basis of the objections or challenge, and the remedy sought. If the appellant is requesting that supplemental evidence be included in the record and considered by the Board, such a request, with the proposed supplemental evidence, must be submitted with the appeal.

The appellant has not requested that any supplemental information be included in the record.

3. STANDING

The appellant is the licensee and owner of the dams that are subject to the Department's April 30, 2003 certification decision. The appellant is thus an aggrieved person as defined by the Department's Chapter 2 Rules and has standing to bring an appeal.

4. BASIS OF APPEAL

The appellant claims that the Department's April 30, 2003 certification decision suffers from substantial legal and factual infirmities. Specifically, the appellant contends that:

(1) Water quality certification is not required for the FERLC relicensing of the existing Presumpscot River Projects because the relicensing will not result in a discharge into navigable waters, the threshold for requiring certification under Section 401 of the federal Clean Water Act;

(2) Even if certification is required, the Department's authority is limited to ensuring that the activity will comply with State water quality standards, and conditions in the certification regarding bypass reach minimum flows, upstream and downstream eel passage, anadromous fish passage, reaeration, and recreational facilities do not relate to water quality standards;

(3) The certification conditions regarding bypass reach minimum flows are improperly based on a 3/4 wetted width policy that has not been adopted through rulemaking;

(4) The certification decision incorrectly applies an instantaneous, rather than a daily average, dissolved oxygen standard, and fails to properly account for non-point sources of pollution that impact dissolved oxygen levels in the Presumpscot River;

(5) The certification contains numerous conditions requiring that S.D. Warren submit plans for Department approval without providing standards by which the Department will judge the adequacy of these plans, making all such conditions invalid;

(6) The certification contains several conditions that impermissibly allow the Department to "reopen" the certification to impose additional or different requirements in the future;

(7) The certification would mandate non-attainment of the designated use of hydroelectric power generation, in violation of State water quality standards and antidegradation requirements;

(8) The operational restrictions imposed in the certification for downstream eel passage are not consistent with the US Department of Interior's Section 18 fishway prescription; and

(9) The certification improperly, relies on a draft fishery management plan that has not been subject to public notice and comment or finalized in the appropriate manner by the State's fishery resource agencies.

The appellant requests that the Board either revoke the Department's April 30, 2003 decision and declare that no water quality certification is required for the Presumpscot River Hydro Projects, or amend the decision to correct the errors as identified in the appeal.

5. RESPONSE TO APPEAL

(1) *Certification Jurisdiction.*

Section 401 of the Clean Water Act (CWA) (33 USC 1251 *et seq.*) provides that "[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters (of the United States), shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions . . . of this Act."

The appellant urges the Board to adopt a reading of the language of Section 401 that is not consistent with the broad language of the statute.

Section 401 does not, as appellants suggest, state that in order to trigger the requirement for a water quality certification, a discharge must contain pollutants or some other substance; or that it be different in kind or volume from a discharge that was permitted under an older, expired license. Rather, it requires a water quality certification for an activity for which a federal

license is necessary that "may result in *any discharge* into the navigable waters" (emphasis added). This includes releases of water from a dam that contain no pollutants. In fact, under the CWA, the term "discharge" is defined more broadly than the term "discharge of pollutants." Section 502 of the CWA states that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants," thus indicating that it includes more than simply the discharge of pollutants. This reading of Section 401 is consistent with the Congressional policy of recognizing the "primary responsibilities and rights of States to prevent, reduce and eliminate *pollution,*" 33 U.S.C. Section 1251 (emphasis added), which is defined as the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water," 33 U.S.C. Section 1362. *See also PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 710 (1994) (noting "[t]here is no dispute that petitioners were required to obtain a certification from the State pursuant to [section] 401" because petitioners "concede that, at a minimum, the project will result in two possible discharges," including "the discharge of water at the end of the tailrace after the water has been used to generate electricity").

The Environmental Protection Agency (EPA), which is responsible for implementing the Clean Water Act, has taken the position that "any discharge" as used in Section 401(a) is broader than "discharge of pollutants." Additionally, FERC has consistently taken the position that applicants for hydropower project licensing or relicensing are subject to Section 401 certification, and has adopted regulations (18 CFR Sections 4.38 and

16.8) requiring that any application for licensing or relicensing must include either (A) a copy of a certification, (B) a copy of a request for certification, including proof of the date on which the certifying agency received the request in accordance with applicable law governing filings with that agency, or (C) evidence of a waiver of certification.

Finally, by Executive Order No. FY 96/97, the Governor of the State of Maine has designated the Department of Environmental Protection as the agency responsible for certifying compliance with applicable water quality standards, pursuant to Section 401 of the Clean Water Act, for all activities within the state not subject to Land Use Regulation Commission permitting review and approval, "including, but not limited to, the licensing and relicensing of all existing hydropower projects."

In its April 30, 2003 Order, the Department determined that the proposed continued operation of the Presumpscot River Projects qualifies as an activity that is subject to Section 401 certification. The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's determination that Section 401 certification is required for the relicensing of the Presumpscot River Projects. Specifically, the appellant has not identified any controlling legal precedent to support its theory that Section 401 certification is not required for the relicensing of these or any other hydropower projects.

(2) *Conditions of Certification.*

Under Maine's Water Classification Program, 38 MRSA Sections 464-469, there are four

classifications (Class AA, A, B, and C) of fresh surface waters and one classification (Class GPA) of great ponds. Each classification sets forth the designated uses, numeric standards, and narrative standards applicable to that class of waters.

The waters of the Presumpscot River that are or may be affected by the Presumpscot River Projects are variously classified as Class A (from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond), Class B (from its confluence with the Pleasant River to Saccarappa Falls), Class C (from Saccarappa Falls to tidewater), and Class GPA (Dundee Pond).

Under the State's antidegradation policy; which is included in the Water Classification Program at 38 MRSA Section 464(4)(F), the Department may only approve water quality certification if the standards of classification of the waterbody and the requirements of the antidegradation policy are met The antidegradation policy further provides that the Department may approve water quality certification for a project affecting a waterbody in which the standards of classification are not met if the project does not cause or contribute to the failure of the waterbody to meet the standards of classification.

With respect to minimum flows at the Dundee Project, in its April 30, 2003 Order, the Department determined that the applicant's proposals for providing seasonally varied minimum flow releases (57 cfs from May 1 through September 30, 30 cfs in April and October, and 20 cfs from November 1 through March 31) in the 1,075-foot-long Dundee bypass reach will be adequate to ensure that these waters will be suitable for the

designated uses of habitat for fish and for fishing, subject to the other provisions of the Order. The Department further determined that minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 are necessary to ensure that the waters in the Dundee bypass reach will be suitable for the designated use of habitat for fish and aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community.

With respect to minimum flows at the Gambo Project, in its April 30, 2003 Order, the Department determined that a year-round minimum flow of 40 cfs in the 300-foot-long Gambo bypass reach is necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing, and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order. The Department further determined that a year-round minimum flow of 60 cfs is necessary to ensure that the waters in the Gambo bypass reach will be suitable for the designated use of habitat for aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community, subject to the other provisions of the order.

With respect to minimum flows at the Mallison Falls Project, in its April 30, 2003 Order, the Department determined that seasonally varied minimum flows (60 cfs from May 1 through September 30 and 40 cfs from October 1 through April 30) in the 675-foot-long Mallison Falls

bypass reach are necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing, and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order. The Department further determined that minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 are necessary to ensure that the identified waters will be suitable for the designated use of habitat for aquatic life and that the waters in the Mallison Falls bypass reach will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community, subject to the other provisions of the order.

With respect to upstream eel passage, in its April 30, 2003 Order, the Department determined that the installation of upstream eel passage facilities at all five project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

With respect to downstream eel passage, in its April 30, 2003 Order, the Department determined that the applicant's proposals for downstream eel passage (suspending generation at all five projects for 4 hours per night for four one-week periods during the downstream eel migration season, and conducting a 3-year study to determine the exact timing of the generation shutdown) will be adequate to ensure that the project waters will be suitable for the designated

uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

With respect to anadromous fish passage, in its April 30, 2003 Order, the Department determined that the phased installation of' upstream and downstream anadromous fish passage facilities at each of the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

With respect to reaeration, in its April 30, 2003 Order, the Department determined that the spillage of 50 cfs at the Dundee Project and 100 cfs at the Gambo Project under specified river temperature conditions, or other equivalent measures, are necessary to meet Class B dissolved oxygen standards in the river under dry weather conditions.

With respect to recreational facilities, in its April 30, 2003 Order, the Department determined that the applicant's proposals to develop a Recreational Facility Enhancement Plan for each of the five projects, consisting of various measures intended to maintain and/or enhance recreational access and use in the project areas, will be adequate to ensure that the project waters are suitable for the designated use of recreation in and on the water, subject to the other provisions of the order.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's determinations that the conditions in the Section 401 certification regarding bypass reach minimum flows, upstream and downstream eel passage, anadromous fish passage, reaeration, and recreational facilities are necessary to ensure that the operation of the Presumpscot River Projects will comply with State water quality standards.

Warren argues that the Department has no authority to condition its Section 401 certification for these projects (and, by extension, for any other hydropower projects) to impose minimum flow, fish passage, or recreational facilities requirements (dissolved oxygen is discussed below). Warren's position is that, as long as the designated uses of fish, fishing, and aquatic habitat are present to any degree in any portion of the river, then water quality standards are being attained. We note that the appellant has not appealed minimum flow requirements for Little Falls and Sacarrappa, given that these were proposed by Warren in its application. See Appeal of S.D. Warren at 10.

Generally, when issuing a water quality certification, the State must determine whether all three parts of Maine water quality standards will be met; the designated uses, the numerical criteria for water chemistry, and the narrative criteria. *Bangor Hydro-Electric Company, et al. v. Board of Environmental Protection,* 595 A 2d. 438, 442 (Me. 1991). In determining whether the project will comply with the designated uses for the water body, it is not enough that the quality of the water is such that it may *potentially* support

the use. Rather the Department must decide whether "the designated uses actually were achieved in a particular river." *Id.* Moreover, the "classification statute recognizes that all water quality standards may not be achieved at a given time." *Id.* Where water quality standards are not being met, the designated uses "provide goals for the state's management of its classified waters." *Id.* In the Bangor Hydro case, the Supreme Judicial Court held that it was proper for the Board to consider such goals in reviewing a new license for an existing hydropower project. *Id.* at 443. *See also PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700 (1994) (a minimum flow requirement imposed by the State of Washington was appropriate and necessary to meet the designated use of fish habitat).

More specifically, water quality standards for the waters in question require that the waters be suitable for the designated uses of fishing, recreation and as habitat for fish and other aquatic life; and that the habitat be characterized, for Class A and Class B waters, respectively, as "natural" or "unimpaired." 38 MRSA Section 465. "Unimpaired" is defined as "without diminished capacity to support aquatic life." 38 MRSA Section 466(11). "Natural" is defined as "a state of nature not measurably affected by human activity." 38 MRSA Section 466(9). The statute also provides that for Class B waters, "the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community." 38 MRSA Section 465(3). "Without detrimental changes in the resident biological community" means "no significant loss

of species or excessive dominance by any species or group of species attributable to human activity." 38 MRSA Section 466(12), Nowhere, as appellant suggests, does the statute state that "some" of the waters be suitable for the designated uses; that "some" of the aquatic species indigenous to the waters be supported; or that "some" of the habitat must be unimpaired or natural. On the contrary the terms "receiving waters" and "habitat" are unqualified and the statute specifically states that the water quality must be such as to support "all" indigenous aquatic species.

The record in this case demonstrates that Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river. Appellant's contention that water quality standards are being attained as long as the designated uses of fish, fishing, and aquatic habitat are present to any degree in any portion of the river is thus contrary to the language of the statute and to the Legislature's stated objective "to restore and maintain the chemical, physical and biological integrity of the State's waters." 38 MRSA Section 464(1).

Warren further contends that fish passage conditions in the certification go beyond the Department's authority to issue water quality certification because they address fisheries management issues under the jurisdiction of other

State and federal agencies. The Maine Supreme Judicial Court, however, has found that mitigation measures, specifically, fish passage and recreation facilities, "clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat" *Bangor Hydro-Electric Co., et al. v. Board of Environmental Protection,* 595 A.2d 438, 443 (Me. 1991). In that case, the Board denied Bangor Hydro-Electric's application for water quality certification when it failed to produce information regarding its planned mitigation measures, including fish passage and recreational facilities. The Court held that the Board was within its authority under the water quality laws to request information regarding fish passage as part of the water quality certification review. *See also, PUD No. 1,* 511 U.S. 700, 715 (1994) (state water quality certification requirement that a dam owner provide minimum flow to protect fishery in the by-pass reach consistent with the designated use of fish habitat was appropriate under Section 401).

Finally, Warren contends that the DEP's *2002 Integrated Water Quality Monitoring and Assessment Report* does not list the Presumpscot River as being impaired for any reason other than dissolved oxygen, and therefore the conditions in the certification relating to minimum flows, fish apssage [sic] and recreational facilities are unjustified. However, the report cited by Warren is a draft, not a final, report to EPA on the water quality attainment status of all of the state's waters. It is anticipated that the final report will reflect the status of attainment of the Presumpscot River as discussed in the DEP's April 30, 2003 certification Order.

With respect to dissolved oxygen, Warren's argument is that the Department has no authority to condition its Section 401 certification for the Dundee and Gambo Projects to impose reaeration requirements. Warren's position is that the dams pre-date water quality standards and that the operation of the projects does not result in a violation of dissolved oxygen standards.

However, this argument ignores the fact that, based on the evidence in the record, the Dundee and Gambo Dams clearly cause or contribute to the current violation of dissolved oxygen standards in several parts of the Presumpscot River. Were these dams not in place and operating in such a way as to reduce natural reaeration, to increase time of travel, to increase water temperature, and to create settling basins for sediments and nutrients, dissolved oxygen standards would be met in the Gambo, Little Falls, and Saccarappa impoundments, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal. Under these circumstances, it is necessary and appropriate to condition fire operation of the Dundee. and Gambo Dams to require such changes as will eliminate the dams' contribution to the violation of dissolved oxygen standards. To do otherwise would be to condemn the river to its current condition, with the survival, growth and reproduction of fish and other aquatic animals being compromised by these dams, and with dissolved oxygen standards continuing to be violated, due in part to these dams and their current operation.

Warren's argument also ignores the fact that water quality standards apply to all activities, including those that pre-date the enactment of the

standards. Water quality standards have been applied since their adoption to many pre-existing activities, including the discharge of waste water from Warren's own Westbrook paper mill. It is largely through the application of water quality standards to existing waste water discharges and to the operation of existing dams that the water quality of Maine's rivers and streams has been improved over the last 30-plus years. To argue that Warren's dams are not subject to water quality standards is to argue the Presumpscot River is somehow exempt from meeting the standards that apply to all other rivers in the State, or that the Presumpscot River dams are somehow exempt from the kind of regulation that has been applied for over 20 years to all other dams in the State. There is no basis in law or regulation for such an exemption.

(3) *Minimum Flow Policy.*

The waters of the Presumpscot River in the bypass reaches below the Dundee, Gambo and Mallison Falls Dams are variously classified as Class A and B waters.

Under Maine's Water Classification Program, 38 MRSA Sections 464-469, Class A and B waters shall be of such quality that they are suitable for the designated use of, among other things, habitat for fish and other aquatic life, and shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community.

In its April 30, 2003 Order, the Department stated that it has found that, generally, flows.

providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of a river or stream, as measured from bank full conditions, are sufficient to meet aquatic life and habitat standards. The Department further stated that each waterway is different in terms of the value of various flows in providing habitat for aquatic life, and that conflicts may exist between the habitat needs of various resident aquatic organisms. Finally, the Department stated that, as a result, on a case-by-case basis, it often, establishes alternative flows based on identified site-specific conditions and data, where those alternative flows can be shown to meet all water quality standards.

In its April 30, 2003 Order, the Department then presented the case-by-case analysis of the bypass flows needed to meet aquatic life standards at the Presumpscot River Projects that was done in this case. Based on this analysis, the Department determined that:

- The applicant's proposals for maintaining existing leakage flows at the Little Falls and Saccarappa Projects were adequate to ensure that the waters of these bypass reaches will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative water quality standards for these waters will be satisfied;

- A year-round minimum flow of 60 cfs at the Gambo Project was necessary to ensure that the waters of this bypass reach will be suitable for the designated use of habitat for aquatic life and that these waters will be of sufficient quality to support all aquatic species indigenous to these waters

without detrimental changes in the resident biological community; and

- Seasonally varied minimum flows (60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30) at the Dundee and Mallison Falls Projects were necessary to ensure that the waters of these bypass reaches will be suitable for the designated use of habitat for aquatic life and that these waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the basis for the Department's determination regarding the minimum flows needed to meet water quality standards in the Dundee, Gambo, and Mallison Falls bypass reaches.

Warren argues that, in determining bypass reach minimum flows, the Department improperly applied an internal Department policy that has not been adopted through rulemaking. Warren's position is that, because the policy is in effect a rule, the Department may not use the policy to impose a ¾ wetted width requirement for bypass reach minimum flows.

However, it is clear that, in its April 30, 2003 Order, the Department did not base its minimum flow determinations on meeting a wetted width requirement that has not been adopted by rule. Rather, the evidence in the record clearly demonstrates that the Department made a case-by-case determination of the habitat value of various bypass reach minimum flows based on a

substantial body of substrate and habitat suitability data, much of which was derived from studies conducted by Warren. Further, none of the minimum flow requirements imposed by the Department actually requires maintenance of ¾ wetted width conditions, and only one flow (60 cfs in the Mallison Falls bypass reach from May 1 through October 31) exceeds ¾ wetted width conditions. Indeed, for the Little Falls and Saccarappa bypass reaches, the Department determined that, based on the limited habitat value of the predominant ledge substrate, existing leakage flows would be sufficient to meet water quality standards, and wetted width conditions were not even calculated for these bypasses.

Finally, it should be noted that the bypass flow conditions for the Dundee and Mallison Falls Projects imposed by the Department's April 30, 2003 Order are very similar to the proposals made by Warren in its application. Warren has provided no reason why, if these proposals were acceptable at the time of the application, they have become less so now.

(4) *Dissolved Oxygen Standard.*

The waters of the Presumpscot River are classified as Class B waters from its confluence with the Pleasant River (located at about the half-way point along the Gambo impoundment) to Saccarappa Falls (at the location of the Saccarappa Dam).

Under Maine's Water Classification Program, 38 MRSA Section 464-469, the dissolved oxygen content of Class B waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October

1st to May 14th, in order to ensure spawning and egg incubation of indigenous fish species, the 7-day mean dissolved oxygen concentration shall not be less than 9.5 parts per million and the 1-day minimum dissolved oxygen concentration shall not be less than 9.5 parts per million in identified fish spawning areas.

In its April 30, 2003 Order, the Department determined that water quality modeling predicted non-attainment of Class B dissolved oxygen (DO) under critical water quality conditions (summer low flow/high temperature conditions) in portions of the Little Falls, Mallison Falls, and Saccarappa impoundments. The Department also determined that actual in-stream monitoring showed non-attainment of Class B DO standards in the lower Gambo, Little Falls, and Saccarappa impoundments during the summers from 1997 through 2002.

In its April 30, 2003 Order, the Department further determined that the non-attainment of dissolved oxygen standards in the Presumpscot River is the result of (1) the existence of multiple impoundments in close proximity to one another, (2) the lack of natural reaeration below the dams, (3) the over-night respiration of bottom attached algae, and (4) the impacts of non-point sources of pollution (e.g., agricultural runoff and sedimentation from land use activities). The Department also determined that, were it not for the presence of the project dams, the Presumpscot River would meet Class B DO standards, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal. Finally, the Department determined that the project dams cause or contribute to the

violation of dissolved oxygen standards in the river.

In its April 30, 2003 Order, the Department specifically noted that Warren, as the owner of the Presumpscot River Projects, should not be responsible for the abatement of non-point source pollution or for mitigating the effects of such pollution on dissolved oxygen concentrations under wet weather conditions.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's decision to apply an instantaneous dissolved oxygen standard. In addition, the appellant has not presented any persuasive arguments or supplemental evidence demonstrating that the Department failed to properly account for non-point sources of pollution that impact dissolved oxygen levels in the Presumpscot River.

Warren's arguments are (1) that the current dissolved oxygen standard should be measured on a daily average, rather than an instantaneous, basis and (2) that, contrary to its statements, the Department has made Warren responsible for the impact of non-point source pollution during dry periods.

With respect to the dissolved oxygen standard, the Department has consistently interpreted and applied the Class B dissolved oxygen standard of 7 parts per million as an instantaneous minimum standard in all of its licensing, permitting and certification actions. The Department has also consistently developed water quality models and conducted water quality monitoring to determine instantaneous DO levels, in keeping

with EPA program guidance and protocols. Indeed, EPA water quality criteria for ambient dissolved oxygen concentration (1986 "Gold Book") specify that the 5.0 milligram per liter (which is equivalent to parts per million) minimum criterion for early life stages of coldwater and warmwater fish should be considered as instantaneous concentrations to be achieved at all times. This criterion has been applied as an instantaneous standard in all of the Department's licensing, permitting and certification actions, including the licensing of the waste water discharge from Warren's Westbrook paper mill.

Applying Warren's reasoning, oxygen levels could in fact fall below the instantaneous minimum threshold of 5 parts per million needed to sustain fish for substantial periods of time during a given day, so long as the daily average DO level was 7 parts per million. This could result in the outcome that fish would be dead or dying due to oxygen deprivation while dissolved oxygen standards, designed to protect fish, were still being met.

There is nothing in the law to suggest that minimum DO levels only need be met on a daily average basis, and there is nothing in biology to suggest that fish and other aquatic organisms can survive with minimum DO levels provided only on a daily average basis.

With respect to the impact of non-point source pollution, the evidence in the record clearly demonstrates that, under summer low flow conditions, the impact of tributary flows on the dissolved oxygen levels in the Presumpscot River is so small as to be within measurement error. Therefore, there is no impact of non-point source

pollution on DO levels in the river during dry periods, and Warren is not being held responsible, for mitigating the impact of non-point source pollution. The only impact Warren is being held responsible for mitigating is the impact of its dams on DO levels in the river.

Finally, the water in the Presumpscot River, especially under low flow conditions, is basically Sebago Lake water, which is of such purity that it is distributed to the customers of the Portland Water District virtually without treatment. Were it not for the presence of Warren's dams, it is expected that the Presumpscot River would meet applicable dissolved oxygen standards throughout its length from Sebago Lake to the ocean.

(5) *Condition Compliance Approvals.*

As noted on page 2 above, the Department's April 30, 2003 Order included a number of conditions deemed necessary to assure that the continued operation of the Presumpscot River Projects would meet water quality standards. These conditions included requirements for run-of-river operation with maximum impoundment fluctuations and specified minimum bypass flow releases at each project; installation and operation of upstream eel passage facilities at each project; implementation of operational measures to provide downstream eel passage at each project; the phased installation and operation of specified upstream and downstream anadromous fish passage facilities, beginning at the Saccarappa Project; implementation of specified reaeration measures at Dundee Dam and Gambo Dam; and development and implementation of a Recreational Facility Enhancement Plan for each project.

In its April 30, 2003 Order, the Department also included a number of conditions requiring that Warren submit various plans to assure compliance with the conditions noted above. These compliance conditions included requirements for Warren to submit the following plans:

- Plans for providing and monitoring run-of-river operations, impoundment levels, and minimum bypass flows as required by Parts A and B of Condition 1;
- Plans for a study to evaluate the effectiveness of minimum bypass flows required by Part B of Condition 1 in providing habitat for Atlantic salmon;
- Final design and operational plans for the upstream eel passage facilities required by Part A of Condition 3;
- Plans for a study or studies to determine the effectiveness of the upstream eel passage facilities required by Part A of Condition 3;
- Plans for a study to determine the exact timing of the operational measures (i.e., generation shutdown) to provide downstream eel passage as required by Part B of Condition 4;
- Final design and operational plans for the upstream and downstream anadromous fish passage facilities required by Parts A and B of Condition 5;
- Plans for a study or studies to determine the effectiveness of the upstream and downstream anadromous fish passage facilities required by Parts A and B of Condition 5;

- Plans for providing and monitoring spillage or other approved reaeration measures at the Dundee Dam and Gambo Dam as required by Part A of Condition 6;
- Plans for a study or studies to determine the effectiveness of the spillage or other measures taken pursuant to Part A of Condition 6 in meeting Class B dissolved oxygen standards; and
- A Recreational Facility Enhancement Plan for each project as required by Part A of Condition 7.

Finally, in its April 30, 2003 Order, the Department required that all condition compliance plans be reviewed and approved by the DEP.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the validity of the Department's conditions requiring that Warren submit various condition compliance plans for DEP review and approval.

Warren instead argues that the plans required by the Department are illegal, because the Order does not include the standards that the Department will use to judge the adequacy of the plans, and that, as a consequence, these plans should not be required.

Contrary to Warren's argument, however, the Department's conditions requiring the submittal, review and approval of plans are both legal and appropriate mechanisms for ensuring that water quality standards are met. The purpose of the required condition compliance plans is to provide assurance that Warren will in fact undertake

sufficient actions to satisfy its obligations to comply with the requirements of the water quality certification. And these condition compliance plans are then reviewed and approved based on the requirements of the certification.

For example, Warren's design and operational plans for Phase I upstream anadromous fish passage facilities at the Saccarappa Dam will be reviewed by the Department to determine whether the proposed facilities constitute a Denil fish ladder, or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually, and that these facilities, which shall include a counting, trapping and sorting facility, will be operational no later than 2 years after passage is available at the downstream Cumberland Mill Dam, as required by Condition 5(A) of the Department's April 30, 2003 Order. In reviewing Warren's plans, the Department will consider the recommendations of the Atlantic Salmon Commission and the Department of Marine Resources, the state agencies with management responsibility for various anadromous fish species and with experience in fish passage design and operation. While varying in form, other conditions requiring the submittal of plans are similarly clear with regard to Warren's compliance obligations.

DEP, FERC and numerous other regulatory agencies have long required the submittal, review and approval of plans intended to demonstrate compliance with permit, license and certification conditions. These have worked well both for regulatory agencies and the regulated community. If plans are submitted that are sufficient to satisfy

the relevant condition of the license, permit or certification, the plans are approved. If plans are submitted that are not sufficient to satisfy the relevant regulatory condition, the plans are either (a) denied and returned for revision and resubmittal or (b) approved with appropriate modifications.

In the absence of employing condition compliance requirements, the Department's only option for ensuring that its water quality certification requirements would be satisfied would be to deny certification, pending the submittal, review and approval of all compliance plans. This option would be much more inefficient and costly for both the Department and the applicant, especially in cases where compliance is not due for some time and where plans reviewed and approved now may be subject to revision and the need for further review and approval in the future.

Further, any decision by the Department to approve, deny or modify Warren's compliance plans constitutes a final agency action that is subject to administrative and judicial appeal. Any objection that Warren has to the Department's decision regarding the adequacy of Warren's compliance plans may be raised through appeals of these compliance decisions.

Finally, Warren has not objected to the requirements that it submit plans for providing and monitoring run-of-river operations, impoundment levels, and minimum bypass flows and for a study to evaluate the effectiveness of minimum bypass flows in providing habitat for Atlantic salmon. These requirements are not fundamentally different in kind from those objected to by

Warren. If these requirements are acceptable, then all other requirements in the Department's April 30, 2003 Order for the filing of condition compliance plans should also be acceptable.

(6) *Reopeners.*

In its April 30, 2003 Order, the Department determined that various follow-up studies should be conducted to evaluate the effectiveness of the facilities and other measures required under the terms of the Order to meet water quality standards. Among the required studies were: a study or studies to determine the effectiveness of the upstream eel passage facilities required by Condition 3; a study to determine the exact timing of the operational measures (i.e., generation shutdown) to provide downstream eel passage as required by Condition 4; a study or studies to determine the effectiveness of the upstream and downstream anadromous fish passage facilities required by Condition 5; and a study or studies to determine the effectiveness of the spillage or, other measures required by Condition 6.

In its April 30, 2003 Order, the Department also included conditions regarding review and action by the Department based on the results of the required studies. Specifically, the April 30, 2003 Order provides that, after reviewing the appropriate study results, and after notice to the applicant and opportunity for hearing, the Department reserves the right to:

- Require reasonable changes in the design and/or operation of the upstream eel passage facilities installed pursuant to Condition 3 as may be deemed necessary to effectively pass eels upstream through the projects;

- Require changes in the timing of the operational shutdowns required by Condition 4 as may be deemed necessary to effectively pass eels downstream through the projects;
- Require reasonable changes in the design and/or operation of the upstream and downstream anadromous fish passage facilities installed pursuant to Condition 5 as may be deemed necessary to effectively pass anadromous fish upstream and downstream through the projects; and
- Reopen and modify the terms of the certification to require reasonable changes in the design and/or operation of the projects as may be deemed necessary to meet Class B dissolved oxygen standards in the river from Dundee Dam to Sacarrappa [sic] Dam under dry weather conditions.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the permissibility of the Department's "reopener" conditions.

Warren essentially argues that the Department has no authority to unilaterally modify the terms of its certification following the issuance of a FERC license.

However, as Warren has acknowledged, the terms and conditions of a state's 401 certification are binding on FERC and must become conditions of any FERC license, pursuant to Section 401(d) of the Clean Water Act. This includes certification conditions that allow for future modification of the terms of the certification based on the results of required effectiveness studies. Therefore, there is no conflict between FERC's

licensing authority and the Department's authority to issue conditional certifications. FERC has issued numerous licenses incorporating similar conditions imposed in water quality certifications issued by the DEP.

Furthermore, Warren has an obligation to demonstrate that the facilities installed and the operational measures implemented at a project are in fact sufficient to meet water quality standards. By Warren's argument, if it built a fishway but the fishway didn't work, the Department would have no legal authority to require that Warren modify the fishway so that it would work. This is an unreasonable outcome that is inconsistent with the Department's responsibility to ensure that water quality standards are met.

Finally, the Department's conditions stipulate that any decision by the Department to modify project facilities or operation must be preceded by the Department's review of the results of an approved effectiveness study and by notice to Warren and the opportunity for a hearing. Moreover, any decision by the Department to modify project facilities or operation based on the results of effectiveness studies constitutes a final agency action that is subject to administrative and judicial appeal. These procedural safeguards will ensure that the reopeners in the certification will be fairly and reasonably applied.

The requirement that effectiveness studies be conducted, and that facilities and/or project operation be modified based on the results of these studies, is a practice (often referred to as "adaptive management") that has long been employed by DEP, FERC and numerous other regulatory agencies, and that has worked well for both the

agencies and the regulated community. If studies show that a particular facility (for example, a fishway) is working as intended (that is, it is passing the required numbers of fish in an efficient and effective manner), then the relevant regulatory condition is satisfied and no changes will be made to the facility. However, if studies show that particular facility is not sufficient to satisfy the relevant regulatory condition (for example, a fishway is not passing the required numbers of fish), then changes must be made in the facility so that it will work as intended.

Moreover, the use of reopener clauses in FERC license have been upheld by the courts. *See Wisconsin Public Service Corp. v. FERC*, 32 F.3d 1165 (7th Cir. 1994) (upholding reopener in FERC license allowing Secretaries of Interior or Commerce to prescribe fishways if and when they are needed in the future). Without the use of reopener clauses, the DEP would have to act on incomplete information, requiring – especially in light of the fact that the license term will be 30 to 50 years – that the Department take a more conservative and inflexible approach to licensing. This could mean requiring costly mitigation measures that might have been shown, by appropriate studies, to be unnecessary.

(7) *Designated Use of Hydroelectric Power Generation.*

The waters of the Presumpscot River are variously classified as Class A, B, C and GPA waters. Under Maine's Water Classification Program, 38 MRSA Sections 464-469, these waters shall be suitable for the designated use of, among other things, hydroelectric power generation.

In its April 30, 2003 Order, the Department determined that the minimum bypass flows, spillage flows, and fish passage facilities required by the Order will reduce the average annual generation of the five combined projects from 40.5 million to 34.5 million kilowatt-hours of electricity. The Department also determined that, in view of the evidence on the record, there is a reasonable assurance that the proposed operation of the projects, as conditioned by the Order, will be adequate to ensure that the project waters are suitable for the designated use of hydroelectric power generation.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the Department's determinations regarding power generation. In addition, the appellant has not presented any persuasive arguments or supplemental evidence demonstrating that the Department's decision would mandate nonattainment of a designated use in violation of the State's antidegradation policy.

Warren's arguments are that the conditions of the Department's Order will result in a loss of hydroelectric power generation and will make the projects uneconomic to operate. Hydroelectric power generation, however, is just one of the several designated uses that must be protected in the subject waters under the Water Classification Law. All parts of the statute must be read together and the Department is not free to disregard one designated use in favor of another. *Rubin v. Board of Environmental Protection*, 577 A.2d 1189, 1192 (Me. 1990) (statute must be interpreted in a way that preserves the meaning of all its parts). Thus, it is often the case in making permitting and certification decisions, as it is

here, that no single designated use – be it recreation in and on the water, fishing, hydroelectric power generation, or habitat for fish and other aquatic life – can be maximized, due to the impacts on the other designated uses. In the case of the relicensing of a hydro project, this may mean, as here, that the project facilities and/or operation deemed necessary to meet other water quality standards will result in some loss of generation.

In addition, the most expensive certification requirement – the building of upstream anadromous fish passage facilities – is contingent on passage being available at the Cumberland Mills Dam and the passage of specified numbers of fish above the Saccarappa Project. Thus, it cannot be said with any certainty when, or if, fish passage will be required at any of the Presumpscot River Projects. It follows that it cannot be said with any certainty that the projects will become uneconomic in the future. And even if a particular project does become uneconomic for Warren, the costs of complying with the requirements of the certification will be only one factor determining the economic viability of the project.

(8) *Fishway Prescription.*

In a May 1, 2003 letter transmitting its April 30, 2003 certification decision to FERC, the Department included the following paragraph:

"With respect to downstream eel passage, we have concluded that the applicant's proposal for providing downstream passage at the projects (suspending generation for 4 hours a night for 4 weeks during the annual downstream eel migration season) should be adequate for eel passage.

However, the U.S. Department of Interior's fishway prescription for the projects includes a stipulation that generation be suspended for 8 hours a night for 8 weeks a year to protect downstream migrating eels. We understand that this prescription is binding on FERC in the relicensing process. While we do not believe the longer shutdown periods specified by Interior are justified, we do not see any conflict between the provisions of our certification and the more stringent downstream eel passage provisions prescribed by Interior."

Warren objects to the Department's conclusion that there is no conflict between the Department's downstream eel passage condition and Interior's downstream eel passage prescription. Warren argues that the longer shutdown advocated by Interior would further reduce the annual power generation of the projects, thus jeopardizing the designated use of hydropower generation.

Warren, however, misconstrues the nature of the statement to which it objects. Any statements made by the Department in its letter to FERC are not part of the certification and constitute the Department's opinion only; and do not constitute final agency action subject to administrative or judicial appeal. Even if this statement was reviewable, the statement is correct given that, under the Federal Power Act, the States' power to condition a FERC license through its water quality certification authority does not in any way limit the Department of the Interior's prescriptive authority.

(9) *Fishery Management Plan.*

In its April 30, 2003 Order, the Department determined that the Presumpscot River historically supported self-sustaining populations of various anadromous fish species, and that, over time, these fish were extirpated from the river by the construction of dams that blocked passage and by pollution. The Department also determined that the State's fisheries agencies had developed a draft plan for the restoration of various anadromous fish to the river basin, and that the plan included the following order-of-magnitude estimates of annual anadromous fish production potential in the river basin: 73,900 American shad; 450,200 blueback herring; 147,700 alewife; and 386 Atlantic salmon. Finally, the Department determined that the phased installation of upstream and downstream anadromous fish passage facilities at each of the projects dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of the order.

The appellant has not presented any persuasive arguments or supplemental evidence calling into question the basis for the Department's determination regarding the need for anadromous fish passage at the project dams.

Warren argues that the Department cannot and should not include substantial new conditions requiring fish passage based only on a draft fishery management plan that has not undergone public review and is not final.

The draft plan, however, was not, as Warren contends, the "basis" on which the fish passage conditions were imposed. The plan was one piece of information, among others, that the Department considered in making its determination that certain fish passage conditions were necessary to meet water quality standards. Moreover, to the extent that Warren implies that a final fishery management plan is necessary before the Department may impose fish passage conditions in a certification, it is not correct as a matter of law. There is nothing in statute or regulation that limits the Department's authority to require fish passage in order to meet water quality standards to those instances where a final fishery management plan has been adopted by the relevant state agency(ies) through a public process. Indeed, over the years, many fishways have been required by the Department and constructed and operated by hydropower project owners on rivers where no formal fishery management plan has been adopted.

Taking Warren's argument to its logical extension, no fishways could be required anywhere by DEP (or, by the state's own fisheries agencies) unless a final fishery management plan had been adopted, even though (1) the state's fisheries agencies are already charged under law with restoring sea-run fish to their historic habitat, and (2) the DEP is already charged under law with restoring the chemical, physical and biological integrity of the State's waters. Such an argument has no legal basis and could limit the restoration of sea-run fish to Maine's waters and the attainment of water quality standards in Maine's waters.

Based on the above Findings of Fact, the Board concludes that:

1. The appellant has standing and has filed a timely appeal.

2. The appellant has not presented persuasive arguments or supplemental evidence that would support overturning or modifying the Department's April 30, 2003 water quality certification for the Presumpscot River Hydro Projects.

THEREFORE, the Board AFFIRMS the Department Order approving the applications of S.D. WARREN COMPANY for Water Quality certification for the continued operation of the Presumpscot River Hydro Projects, and DENIES the appeal of S.D. WARREN COMPANY to overturn or modify that Order. The findings, conclusions and conditions of Department Order #L-19713-33-E-N, #L-19714-33-E-N, #L-19715-33-E-N, #L-19716-33-E-N, and #L-19717-33-E-N dated April 30, 2003 are adopted by the Board and incorporated herein.

DONE AND DATED AT AUGUSTA, MAINE, THIS 2nd DAY OF October, 2003.

BOARD OF ENVIRONMENTAL PROTECTION

BY: /s/ Richard E. Wardwell
Richard E. Wardwell, Chair

PLEASE NOTE ATTACHED SHEET FOR BOARD RECONSIDERATION AND JUDICIAL REVIEW PROCEDURES

[LOGO] STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

DEPARTMENT ORDER

IN THE MATTER OF

S.D. WARREN COMPANY	)	MAINE WATER
Gorham, Windham, and	)	QUALITY
Westbrook Cumberland County	)	PROGRAM;
PRESUMPSCOT RIVER	)	FEDERAL CLEAN
HYDRO PROJECTS	)	WATER ACT
#L-19713-33-E-N (Dundee)	)	WATER QUALITY
#L-19714-33-E-N (Gambo)	)	CERTIFICATION
#L-19715-33-E-N (Little Falls)	)	
#L-19716-33-E-N (Mallison Falls)	)	
#L-19717-33-E-N (Saccarappa)	)	

Pursuant to the provisions of 38 MRSA Section 464 *et seq.* and Section 401 of the Federal Water Pollution Control Act ("Clean Water Act"), the Department of Environmental Protection has considered the applications of S.D. WARREN COMPANY with their supportive data, agency comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. APPLICATION SUMMARY

a. *Applications*. S.D. Warren Company proposes the continued operation of the Dundee, Gambo, Little Falls, Mallison Falls, and Saccarappa Hydroelectric Projects (collectively, the Presumpscot River Projects), located on the Presumpscot River in the Towns of Gorham and Windham and the City of Westbrook, Cumberland County, Maine.

b. *Existing Project Features*. The five existing projects consist of five contiguous dams, impoundments,

powerhouses, and appurtenant facilities (see Exhibit 1), as described below.

Dundee Project. The Dundee Project, located at River Mile 21.9, consists of a 1,492-foot-long, 50-foot-high concrete dam with earthen abutments and two-foot-high spillway flashboards, a powerhouse integral with the dam containing three turbine-generator units with a total rated generating capacity of 2,400 kW, and a 1,075-foot-long tailrace channel formed by a natural earth and bedrock berm (see Exhibit 2).

The Dundee Dam creates a 197-acre impoundment with a normal full pond elevation of 187.22 feet (USGS datum) that extends 1.7 miles upstream to the tailwaters of the North Gorham Project, which is owned and operated by FPL Energy Maine Hydro LLC.

The Dundee Project creates a 1,075-foot-long bypass reach between the dam and the downstream end of the tailrace channel. The lower 200 feet of the bypass reach is backwatered by the downstream Gambo Project impoundment.

Gambo Project. The Gambo Project, located at River Mile 18.6, consists or a 300-foot-long, 24-foot-high concrete dam with 16-inch-high spillway flashboards, a 50-foot-long headgate structure, 737-foot-long concrete-lined intake power canal, and a powerhouse containing four turbine-generator units with a total rated generating capacity of 1,900 kW (see Exhibit 3).

The Gambo Dam creates a 151-acre impoundment with a normal full pond elevation of 135.13 feet (USGS datum) that extends upstream 3.3 miles to the tailwaters of the Dundee Project.

The Gambo Project creates a 300-foot-long bypass reach between the dam and the powerhouse tailwaters. The bypass reach is entirely free flowing.

Little Falls Project. The Little Falls Project, located at River Mile 16.9, consists of a 310-foot-long, 14-foot-high L-shaped concrete and masonry dam with 2-foot-high flashboards, and a powerhouse integral with the dam containing four turbine-generator units with a total rated generating capacity of 1,000 kW (see Exhibit 4).

The Little Falls Dam creates a 29-acre impoundment with a normal full pond elevation of 108.7 feet (USGS datum) that extends upstream 1.7 miles to the tailwaters of the Gambo Project.

The Little Falls Project creates a 300-foot-long bypass reach between the upper section of the dam and the powerhouse tailwaters. The lower 100 feet of the bypass reach is backwatered by the project tailwaters.

Mallison Falls Project. The Mallison Falls Project, located at River Mile 16.4, consists of a 14-foot-high, 358-foot-long concrete, masonry and cut granite diversion dam without flashboards, a 70-foot-long headgate structure, a 675-foot-long bedrock-lined intake power canal, and a powerhouse containing two turbine-generator units with a total rated generating capacity of 800 kW (see Exhibit 5).

The Mallison Falls Dam creates an 8-acre impoundment with a normal full pond elevation of 90.6 feet (USGS datum) that extends upstream 0.5 miles to the tailwaters of the Little Falls Project.

The Mallison Falls Project creates a 675-foot-long bypass reach between the dam and the powerhouse tailwaters. The lower 375 feet of the bypass reach is backwatered by discharges from the Mallison Falls powerhouse and by the downstream Saccarappa Project impoundment.

Saccarappa Project. The Saccarappa Project, located at River Mile 11.3, consists of two 10 to 12-foot high concrete diversion dams without flashboards that are separated by an island, a 60-foot-long headgate structure, an 80-foot-long concrete-lined forebay, a powerhouse containing three turbine-generator units with a total rated generating capacity of 1,350 kW, and a 345-foot-long bedrock-lined tailrace channel formed by a 33-foot-high concrete guard wall (see Exhibit 6).

The Saccarappa Dam creates an 87-acre impoundment with a normal full pond elevation of 69.95 feet (USGS datum) that extends upstream 5.0 miles to the tailwaters of the Mallison Falls Project.

The Saccarappa Project creates two bypass reaches measuring 475 and 390 feet-long between the two diversion dams and the downstream end of the tailrace channel. The bypass reaches are entirely free-flowing.

c. *Construction History*. All five existing projects were constructed in the early 1900's. However, dams have existed at some project locations, including Saccarappa and Mallison Falls, for over 250 years.

d. *Existing Project Operation*. The five projects are operated in a run-of-river mode, with outflow being approximately equal to inflow on an instantaneous basis except during flashboard failure or

replacement. Under normal operating conditions, impoundment levels are maintained within one foot of full pond. However, the evidence in the record (FERC FEIS, June 2002) indicates that impoundment drawdowns in excess of two and three feet have occurred, albeit infrequently, at several of the projects.

There are currently no required minimum flow releases to the bypass reaches at any of the five projects. As a result, the bypass reaches receive only varying amounts of leakage and spillage, with minimum leakage flows ranging from 2 to 33 cubic feet per second (cfs).

The five projects utilize flows provided from Sebago Lake by S.D. Warren's Eel Weir Project and by various minor tributaries to the Presumpscot River downstream from Sebago Lake. Flows from Sebago Lake are currently regulated under a FERC-approved lake level management plan.

The five projects are operated continuously to provide electricity that is used at S.D. Warren's Westbrook paper mill.

e. *Proposed Operation/Protection Mitigation and Enhancement Measures*. The applicant proposes the following operational and non-operational measures for the protection, mitigation and enhancement of public resources:

Dundee

- Continue run-of-river operation and daily headpond monitoring.
- Provide specified minimum flow releases into the bypass reach.

- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Install and operate upstream eel passage facilities and institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: rerouting, stabilizing and maintaining the existing canoe portage trail; seeking an easement to provide walk-in angler access to the bypass reach; and investigating whether an existing access easement can be altered to permit fishery agency access for stocking purposes.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Gambo

- Continue run-of-river operation and daily headpond monitoring.
- Provide specified minimum flow releases into the bypass reach.
- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: enhancing and maintaining the existing informal canoe portage trail; developing

an interpretive sign to explain the history of the Oriental Powder Mill Complex; providing walk-in angler access to the bypass reach; developing parking and signs for carry-in boat access at the portage take-out location; and assisting the Town of Gorham in regrading and enhancing the Gambo Road approach to the former bridge area immediately upstream from the dam.

- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Little Falls

- Continue run-of-river operation and daily headpond monitoring.
- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: establishing and maintaining a canoe portage trail; assisting Gorham Trails in developing parking, signage, and access for a carry-in boat launch at the Gorham Land Trust Property off of Tow Path Road; and donate approximately 0.8 acres of land on the island located off-shore of the Hawkes Property to the Gorham Land trust.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Mallison Falls

- Continue run-of-river operation and daily headpond monitoring.
- Provide specified minimum flow releases into the bypass reach.
- Avoid impoundment drawdowns for maintenance during May and June.
- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: establishing and maintaining a formal canoe portage trail; providing signs for parking and access at the existing carry-in boat access site at the project powerhouse; developing parking, signage, and access for a carry-in boat access site above the project dam; seeking permission from the Department of Transportation and the Town of Gorham to provide a roadside pullout and carry-in boat access site next to the bridge abutment above the project dam; and. continuing to seek an easement or other opportunities to provide walk-in angler access to the bypass reach.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

Saccarappa

- Continue run-of-river operation and daily headpond monitoring.
- Avoid impoundment drawdowns for maintenance during May and June.

- Implement impoundment refill procedures after drawdowns.
- Institute operational measures to provide downstream eel passage.
- Implement a Recreation Facility Enhancement Plan, consisting of: seeking an easement to establish parking, signage, and access for a portage take-out and carry-in boat launch site on the project impoundment.
- Provide for protection and mitigation of adverse effects on identified archaeological sites.

2. JURISDICTION

The proposed continued operation of the Presumpscot River Projects qualifies as an "activity . . . which may result in (a) discharge into the navigable waters (of the United States)" pursuant to the Clean Water Act (CWA), 33 USC 1251 *et seq*. Section 401 of the CWA requires that any applicant for a federal license or permit to conduct such an activity obtain a certification that the activity will comply with applicable State water quality standards. State law authorizes the Department to issue a water quality certification pursuant to Section 401 of the CWA when the standards of classification of the water body and the State's antidegradation policy are met. 38 M.R.S.A. §464(F)(3).

The Presumpscot River Projects were originally licensed by the Federal Energy Regulatory Commission in separate actions between October 31, 1979 and September 17, 1981. The original expiration dates for these licenses ranged from October 1, 1999 to September 1, 2001. In 1996, at S.D. Warren's request, the licenses were modified to all expire on January 26, 2001, in order to facilitate a coordinated review at relicensing.

On January 22, 1999, S.D. Warren filed an Application for Subsequent License with the Federal Energy Regulatory Commission for each of the Presumpscot River Projects, including the Dundee Project (FERC No. 2942), the Gambo Project (FERC No. 2931), the Little Falls Project (FERC No. 2941), the Mallison Falls Project (FERC No. 2932), and the Saccarappa Project (FERC No. 2897).

The Department of Environmental Protection has been designated by the Governor of the State of Maine as the certifying agency for issuance of Section 401 water quality certification for all activities in the State not subject to Land Use Regulation Commission permitting and review. The Presumpscot River Projects are all located within organized municipalities that are not subject to LURC's regulatory jurisdiction. Therefore, the DEP is the certifying agency for the projects.

3. APPLICABLE WATER QUALITY STANDARDS

a *Classification*. The receiving waters that are or may be affected by the project are currently classified as follows:

- Presumpscot River, from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond – Class A. 38 MRSA Section 467(9)(A)(1) and (1-A).
- Dundee Pond – Class GPA, 38 MRSA Section 465-A.
- Presumpscot River, from its confluence with the Pleasant River to Saccarappa Falls – Class B. Further, there may be no new direct discharges to this segment after January 1, 1999. 38 MRSA Section 467(9)(A)(2) and (3).
- Presumpscot River, from Saccarappa Falls to tidewater – Class C. 38 MRSA Section 467(9)(A)(4).

b. *Designated Uses.* Class GPA, Class A, Class B, and Class C waters shall be of such quality that they are suitable for the designated uses of drinking water after disinfection; recreation in and on the water; fishing; industrial process and cooling water supply; hydroelectric power generation; navigation; and as habitat for fish and other aquatic life. The habitat of Class GPA and Class A waters shall be characterized as natural. The habitat of Class B waters shall be characterized as unimpaired. 38 MRSA Section 465(2)(A), 38 MRSA Section 465(3)(A), 38 MRSA Section 465(4)(A), and 38 MRSA Section 465-A(1)(A).

c. *Numeric Standards.* The numeric standards for the receiving waters are as follows.

Class GPA waters shall be described by their trophic state based on measures of the chlorophyll "a" content, Secchi disk transparency, total phosphorus content and other appropriate criteria. Class GPA waters shall have a stable or decreasing trophic state; subject only to natural fluctuations and shall be free of culturally induced algal blooms which impair their use and enjoyment. 38 MRSA Section 465-A(1)(B).

The dissolved oxygen content of Class A waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher, and the aquatic life and bacteria content of these waters shall be as naturally occurs. 38 MRSA Section 465(2)(B).

The dissolved oxygen content of Class B waters shall be not less than 7 parts per million or 75% of saturation, whichever is higher, except that for the period from October 1st to May 14th, in order to ensure spawning and egg incubation of

indigenous fish species, the 7-day mean dissolved oxygen concentration shall not be less than 9.5 parts per million and the 1-day minimum dissolved oxygen concentration shall not be less than 8.0 parts per million in identified fish spawning areas. 38 MRSA Section 465(3)(B).

The dissolved oxygen content of Class C waters may be not less than 5 parts per million or 60% of saturation, whichever is higher, except that in identified salmonid spawning areas where water quality is sufficient to ensure spawning, egg incubation and survival of early life stages, that water quality sufficient for these purposes must be maintained. 38 MRSA Section 465(4)(B).

d. *Narrative Standards.* The narrative standards for the receiving waters are as follows.

There may be no new direct discharge of pollutants into Class GPA waters. Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. 38 MRSA Section 465-A(1)(C)

The habitat and aquatic life criteria of Class GPA are deemed to be met in an existing impoundment classified as GPA if the impounded waters, at a minimum, satisfy Class C aquatic life criteria (the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community), provided that, where the actual quality of the impounded waters attains any more stringent characteristic or criteria, that existing water quality must be maintained and protected. 38 MRSA Section 464(9).

New direct discharges to Class A waters are permitted only if, in addition to satisfying all other requirements, the effluent is equal to or better than the existing water quality of the receiving water. Discharges into these waters licensed prior to January 1, 1986 are allowed to continue only until practical alternatives exist. 38 MRSA Section 465(2)(C).

For the purposes of water quality certification of the hydropower project at the Dundee Dam, the habitat characteristics and aquatic life criteria of Class A are deemed to be met in the waters immediately downstream and measurably affected by that project if Class B designated uses and narrative standards are met. 38 MRSA Section 467(9)(A)(1-A).

Discharges to Class B waters shall not cause adverse impact to aquatic life in that the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community. 38 MRSA Section 465(3)(C).

The habitat characteristics and aquatic life criteria of Classes A and B are deemed to be met in existing impoundments classified as A or B if the impounded waters satisfy Class C aquatic life criteria (the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community), provided that any reasonable changes are implemented that do not significantly affect existing energy generation capability and would result in improvement in the habitat and aquatic life of the impounded waters, and further provided that, when the

actual quality of the impounded waters attains any more stringent habitat characteristic or aquatic life criteria than required under Class C standards, that water quality must be maintained and protected. 38 MRSA Section 464(10).

Discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community. 38 MRSA Section 465(4)(C).

e. *Antidegradation*. The Department may only approve water quality certification if the standards of classification of the waterbody and the requirements of the State's antidegradation policy will be met. The Department may approve water quality certification for a project affecting a waterbody in which the standards of classification are not met if the project does not cause or contribute to the failure of the waterbody to meet the standards of classification, 38 MRSA § 464(4)(F).

4. DUNDEE POND WATER QUALITY AND TROPHIC STATE

   a. *Existing Conditions.* Dundee Pond is an artificial impoundment created by construction of the Dundee Dam. The land area around the pond is densely forested, with limited shoreline development. There are no known discharges of pollutants to the pond, which drains an area of about 445 square miles. Almost all of the drainage (441 square miles) lies above the Sebago Lake outlet dam.

b. *Monitoring Data.* The applicant has conducted ambient water quality monitoring in Dundee Pond in accordance with the DEP's Lake Trophic State Sampling Protocol. Biweekly sampling conducted during a five-month period (June to November) in 1997 included dissolved oxygen and temperature profiles and Secchi disk transparencies. In addition, epilimnetic core samples were taken and analyzed for total phosphorus, Chlorophyll *a*, color, laboratory pH; and total alkalinity.

Analysis of the data indicates that Dundee Pond is a mesotrophic lake, with low to moderate levels of Chlorophyll *a* and total phosphorus. Additionally, the data do not indicate any evidence of increasing pollutant loading to the pond.

c. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the pond for maintenance during May and June.

d. *Discussion.* The applicant's proposals will be adequate to ensure that the trophic state of Dundee Pond remains stable.

5. FISH RESOURCES AND FISHING

a. *Existing Conditions.* The Presumpscot River supports self-sustaining populations of resident warmwater fish species and the American eel. The current warmwater recreational fishery includes smallmouth and largemouth bass, yellow perch, and chain pickerel. The American eel is a catadromous fish that spawns at sea and returns to freshwater lakes and ponds to grow to adulthood.

A coldwater fishery exists in the bypass and tailwater segments of the river down to the Mallison Project. Coldwater species include brown trout, brook trout, and landlocked salmon, all of which are supported primarily by annual stocking. The river does not currently support self-sustaining populations of coldwater fish.

Currently, there are no fish passage facilities in place at any of the eight dams on the river between Sebago Lake in Standish and tidewater in Falmouth. As a result, none of the migratory anadromous species of fish native to the river are currently found in the project areas.

Finally, the lack of minimum flows in the bypass reaches at the projects severely limits the value of these reaches as habitat for various fish species.

b. *Historic Conditions.* Based on historical records, the Presumpscot River throughout the project areas supported self-sustaining populations of various anadromous fish species, including Atlantic salmon, American shad, river herring (alewife and blueback herring), rainbow smelt, and striped bass. Anadromous fish spawn in freshwater and return to the sea to grow to adulthood. Over time, all anadromous fish were extirpated from the river by the construction of dams that blocked passage and by pollution.

c. *Studies.* In 1997, the applicant conducted a Baseline Fisheries Study, which examined species composition and relative abundance, smallmouth bass spawning, growth rates, condition factors, and types of available habitat in the project impoundments and tailwater areas. A total of 17 species were collected during the baseline study,

with the most abundant species being pumpkinseed, smallmouth bass, American eel, and several species of shiner. Fish habitat diversity and quality were found to be generally higher, and more suitable smallmouth bass habitat was found to be available, in the Dundee and Gambo impoundments as compared to the three downstream impoundments. However, two independent analyses (Berger, 2001 and Northern Ecological Associates, 2001) indicate that substrates in the Little Falls, Mallison Falls and Saccarappa impoundments are not as limited as suggested in the applicant's study.

Also in 1997, the applicant conducted a two-phase Habitat and Flow Study of the bypass reach below each of the five project dams. Phase I involved a habitat mapping survey to characterize the aquatic habitat available in the bypass reaches. Phase II entailed flow demonstration assessments to evaluate the minimum flows needed to meet fisheries and other water quality management goals in the bypass reaches found to contain high quality habitat.

The results of the Phase I study indicated that the bypass reaches of the Dundee, Gambo, and Mallison Falls Projects provide relatively high quality habitat with the greatest potential for supporting a limited season trout fishery maintained by annual stocking. The subsequent Phase II study involved rating the suitability of the aquatic habitat in these bypass reaches under various flows.

Finally, in 2000, the applicant conducted an upstream eel migration study at the project dams. This study was conducted to determine the upstream migration patterns, migratory success,

and population of eels occurring within the project waters. Eels were found at each project, indicating that, even without fish passage facilities, some migrating juvenile eels (elvers) were able to migrate upstream over or around some or all of the dams on the river.

d. *Fishery Management Plans*. In December 2001, the Maine Department of Marine Resources, Department of Inland Fisheries and Wildlife, and Atlantic Salmon Commission jointly issued a "Draft Fishery Management Plan For the Presumpscot River Basin."

Under the Draft Plan, management goals include: providing migratory routes and habitat for catadromous American eel and various anadromous species including river herring, American shad, striped bass, and Atlantic salmon, and possibly Atlantic sturgeon, rainbow smelt, sea-run brook trout, sea-run brown trout, and tomcod; sustaining the production of existing riverine species and targeted anadromous and catadromous species; promoting existing and potential commercial and sport fisheries for anadromous, catadromous, and resident species; establishing a recreational fishery for stocked trout in the mainstream; and managing specific tributaries for the production of wild brook trout.

The Draft Plan calls for restoration of anadromous species to occur in two phases, allowing the fisheries agencies to assess potential interactions between resident and anadromous species and changes in fishing opportunities. Phase I involves restoring anadromous fish up to the base of the Gambo Dam. If the three fisheries agencies agree, Phase II will involve restoring

anadromous fish from Gambo dam up to the base of the Eel Weir (Sebago Lake) Dam.

Finally, under the Draft Plan, the fisheries agencies have provided the following order-of-magnitude estimates of annual anadromous fish production potential in the river basin; 73,900 American shad; 450,200 blueback herring; 147,700 alewife; and 386 Atlantic salmon. These estimates were obtained by multiplying fish production per unit area for each species by the total number of area units of aquatic habitat in the river. No production estimates for American eel have been made.

e. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

The applicant also proposes the following procedures for refilling the project impoundments after any drawdowns:

- If allowed under the FERC-approved Sebago lake level management plan, temporarily increase outflows from Sebago Lake to refill the impoundments while maintaining flows from each project as required by the flow/temperature curve component of the approved lake level management plan.
- If increased outflows from Sebago Lake are not allowed under the approved lake level management plan, use a maximum of 25% of the outflow from Sebago Lake to refill the impoundments while maintaining flows from each project equal to at least 75% of the outflow from Sebago Lake.

The applicant also proposes to provide minimum flow releases into the bypass reach at each dam. Specifics on the length, leakage flows, and characteristics of the five bypass reaches, as well as the applicant's minimum flow proposals, are given in the following table:

Presumpscot River Bypass Flows

PROJECT	LENGTH OF BYPASS	EXISTING LEAKAGE FLOW	BYPASS CHARACTERISTICS	S.D. WARREN BYPASS FLOW PROPOSALS*
Dundee	1075 ft	5 cfs	Lower 200 ft of bypass is backwatered by Gambo Dam	57 cfs May 1 – Sept 30 30 cfs April & Oct 20 cfs Nov 1 – Mar 31
Gambo	300 ft	33 cfs	Bypass is entirely free-flowing; existing leakage is from a sluice gate	40 cfs Apr 1 – Oct 31 30 cfs Nov 1 – Mar 31
Little Falls	300 ft	26 cfs	Lower 100 ft of bypass is backwatered by the project tailwaters	Maintain existing leakage
Mallison Falls	675 ft	2 cfs	Lower 375 ft of bypass is backwatered by project tailwaters	60 cfs May 1 – Sept 30 40 cfs Apr & Oct 20 cfs Nov 1 – Mar 31
Saccarappa	East: 475 ft West: 390 ft	5 cfs 8 cfs	Both bypasses are entirely free-flowing	Maintain existing leakage

* Dundee, Gambo and Mallison Falls bypass flows are per S.D. Warren's January 4, 2002 reply to agency comments on FERC DEIS.

The Applicant also proposes to install and operate upstream eel passage facilities at the Dundee Project and to institute operational measures at all five projects to provide downstream eel passage. These operational measures include suspending generation at all five projects for 4 hours per night for four one-week periods during the downstream eel migration season, which generally runs from mid August through the end of October. The applicant also proposes to conduct a 3-year study to determine the exact timing of the generation shutdown, so as to result in the greatest downstream eel passage benefit.

Finally, the applicant does not propose to install any upstream or downstream fish passage facilities for migrating anadromous fish.

f. *Agency Comments.* In comments dated September 23, 2002, the Department of Inland Fisheries and Wildlife (DIF&W) supports the minimum flow releases recommended in the FERC FEIS (June 2002). Specifically, DIF&W recommends adoption of the applicant's minimum flow proposals, as modified to increase winter (Nov 1 through March 31) bypass flows at the Gambo and Mallison Falls Projects to 40 cfs. DIF&W specifically notes that providing adequate minimum flows to the Dundee, Gambo, and Mallison Falls bypass reaches has the potential to produce a significant sport fishery for stocked trout close to the metropolitan Portland area.

In comments dated September 30, 2002, and supplemented December 2, 2002, the Department of Marine Resources (DMR) also supports the minimum flow releases recommended in the FERC FEIS (June 2002). DMR also recommends that upstream eel passage facilities be installed

at all five project dams within two years of licensing, and that generation be suspended at all five project dams for 8 hours per night for eight one-week periods during the downstream eel migration season beginning within 30 days of licensing. In addition, DMR supports the applicant's proposal to conduct a 3-year study to determine the exact timing of the generation shutdown, so as to result in the greatest downstream eel passage benefit. Finally, DMR recommends that upstream and downstream passage facilities for anadromous fish species be provided as follows:

Upstream Passage

Saccarappa Project	Phase I	Denil "fish ladder" designed to pass 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage is available at the downstream Cumberland Mills Dam.
	Phase II	Convert or replace Phase I Denil fish ladder with a fish lift designed to pass 58,000 American shad, 353,000 blueback herring, and 426 Atlantic salmon annually, and including a counting, trapping and sorting facility,

		to be operational no later than 2 years after restoration begins above Gambo Dam and the capacity of the Phase I fish ladder is reached.
Mallison Falls Project	Phase I	Denil "fish ladder" designed to pass 4,200 American shad, 26,000 blueback herring; and 32 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage of 2,960 American shad or 18,020 blueback herring in any single year at the Saccarappa Project.
	Phase II	Convert or replace Phase I Denil fish ladder with a fish lift designed to pass 44,000 American shad, 270,000 blueback herring, and 185 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after restoration begins above Gambo Dam and the capacity of the Phase I fish ladder is reached.
Little Falls Project	Phase I	Denil "fish ladder" designed to pass 3,100

		American shad, 19,000 blueback herring, and 15 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage of 2,960 American shad or 18,020 blueback herring in any single year at the Saccarappa Project.
	Phase II	Convert or replace Phase I Denil fish ladder with a fish lift designed to pass 43,000 American shad, 263,000 blueback herring, and 168 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after restoration begins above Gambo Dam and the capacity of the Phase I fish ladder is reached.
Gambo Project	Phase I	No upstream fish passage requirements.
	Phase II	Fish lift designed to pass 40,000 American shad, 244,000 blueback herring, and 153 Atlantic salmon annually, and including a counting, trapping and sorting facility,

		to be operational no later than 2 years after passage of 620 American shad or 3,800 blueback herring in any single year at the Little Falls Project.
Dundee Project	Phase I	No upstream fish passage requirements.
	Phase II	Fish lift designed to pass 20,000 American shad, 122,000 blueback hearing, and 64 Atlantic salmon annually, and including a counting, trapping and sorting facility, to be operational no later than 2 years after passage of 4,020 American shad or 24,460 blueback herring in any single year at the Gambo Project.
Downstream Passage		
All Projects		Gated surface bypass, to be operational concurrent with the completion of upstream passage facilities at each project or within 2 years of notification of sustained upstream stocking of anadromous fish, whichever comes first.

Finally, in comments dated September 27, 2002 and January 24, 2003, the Atlantic Salmon Commission (ASC) supports the minimum flow

releases recommended in the FERC FEIS (June 2002) and recommends the same provisions for upstream and downstream passage facilities for anadromous fish as recommended by DMR (see above). However, ASC notes that the recommended minimum flows are based on studies that evaluated the habitat value of the bypass reaches for trout, not for salmon. Therefore, the ASC recommends that the adequacy of these minimum flows for Atlantic salmon spawning, egg incubation, and production of juvenile Atlantic salmon be evaluated upon completion of a habitat assessment by the ASC and a decision to initiate Atlantic salmon restoration in the Presumpscot River.

g. *NGO Comments*. Two non-governmental organizations (NGOs), American Rivers and Friends of the Presumpscot River, have participated in the regulatory process as interested parties and, in filings dated November 7, 2000, August 8, October 5, 2001, and September 30, 2002, have submitted comments and supplemental material for the record. In particular, the NGOs have provided primary source documents establishing that anadromous Atlantic salmon, American shad and alewive were indigenous throughout the full length of the Presumpscot River.

In their comments, the NGOs contend that it is illegal for DEP to issue water quality certifications for the five Presumpscot River Projects without specific, precise and enforceable upstream and downstream fishway requirements for each of the projects. The NGOs generally support the provisions for upstream and downstream fish passage facilities for eels and for anadromous fish as recommended by DMR.

h. *Discussion.*

i. *Project Operation and Bypass Flows*. There is a reasonable assurance that the applicant's proposals to maintain run of river operations will be adequate to ensure that the waters in the project impoundments and tailwater areas will be suitable for the designated uses of habitat for fish and for fishing and that all applicable numeric and narrative water quality standards for these waters will be satisfied, subject to the other provisions of this Order.

There is a reasonable assurance that the applicant's proposals for providing seasonally varied minimum flow releases in the Dundee bypass reach will be adequate to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing and that all applicable numeric and narrative water quality standards for these waters will be satisfied, subject to other provisions of this Order.

With respect to the Gambo bypass reach, habitat suitability for target species (brown trout and brook trout) is maximized at a flow of 40 cfs, and flows in the bypass reach must be sufficient to sustain the overwintering of trout in order to produce a significant sport fishery here. In view of the evidence in the record, year-round minimum flows of 40 cfs in the Gambo bypass reach will improve habitat conditions for trout species, and are necessary to ensure that these waters as will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a

reasonable assurance that a year-round minimum flow of 40 cfs in the Gambo bypass reach is necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing, and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters.

With respect to the Mallison Falls bypass reach, flows in the bypass reach must be sufficient to sustain the over-wintering of trout in order to producer significant sport fishery here. In view of the evidence in the record, minimum flows of 60 cfs from May 1 through September 30 and 40 cfs from October 1 through April 30 in the Mallison Falls bypass reach will improve habitat conditions for trout species, and are necessary to ensure that these waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that minimum flows of 60 cfs from May 1 through September 30 and 40 cfs from October 1 through April 30 in the Mallison Falls bypass reach are necessary to ensure that these waters will be suitable for the designated uses of habitat for fish and for fishing and that the identified waters will be of sufficient quality to support all species of fish indigenous to these waters.

Finally, a future study should be conducted to evaluate the effectiveness of the approved minimum bypass flows in providing habitat for various life stages of Atlantic salmon in the bypass reaches in the event that active

Atlantic salmon restoration activities are initiated in the Presumpscot River.

ii. *Eel Passage*. With respect to upstream eel passage, there is evidence that at least some eels are currently migrating upstream past all five project dams, despite the lack of passage facilities. However, eel migration, and thus overall eel populations, would benefit from the installation of upstream passage facilities at each dam, because more eels will successfully pass the dams to reach Sebago Lake with fishways in place than without fishways. The applicant has not provided any convincing evidence to support its proposal that upstream eel passage be installed only at the Dundee Project. In view of the evidence in the record, the installation of upstream eel passage facilities at all five project dams will improve access to habitat for eels and is necessary to ensure that the project waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that the installation of upstream eel passage facilities at the project dams is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters. A follow-up study should be conducted to evaluate the effectiveness of these facilities in providing upstream passage for eels.

With respect to downstream eel passage, there is currently considerable uncertainty regarding the timing and duration of the

downstream migration of adult eels. Generally, eels have been found to migrate downstream at night near the bottom of the water column. As a consequence, traditional downstream passage facilities (usually, surface bypasses or weirs) are of limited value for eels. In addition, the downstream eel migration period has been found to average 8 weeks (range of from 2 to 13 weeks), with peak migration occurring over a 3 to 4 week period (range of from 1 to 5 weeks). The occurrence of peak downstream migration has also been found to be variable from hour to hour, week to week, and year to year. The shut down of generating facilities at night during the downstream eel migration season, often in combination with gate openings, has been demonstrated elsewhere to be an effective means of reducing turbine mortality and thus increasing the number of eels that successfully migrate downstream. However, DMR has not provided any convincing evidence that its recommended expansion of the applicant's proposed shutdown regime from 4 hours to 8 hours a night and from 4 weeks to 8 weeks a year is necessary to provide adequate downstream eel passage, particularly in view of the impact of the expanded shutdown on project generation. Finally, no other hydro project in the state is currently subject to DMR's proposed shut down regime. In view of the evidence in the record, there is a reasonable assurance that the applicant's proposals for downstream eel passage will be adequate to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish, and that the project waters will

be of sufficient quality to support all species of fish indigenous to these waters, subject to the other provisions of this Order. A follow-up study should be conducted, however, to evaluate the effectiveness of these operational measures in providing downstream passage for eels.

iii. *Anadromous Fish Passage.* With respect to upstream and downstream anadromous fish passage, there is convincing evidence in the record that the Presumpscot River historically supported natural populations of American shad, blueback herring, alewive and Atlantic salmon throughout the project areas. State fisheries agencies are developing a plan to restore these species to the river. Once upstream passage is available at the Cumberland Mills Dam, which is located at the applicant's Westbrook paper mill, the phased installation of anadromous fish passage facilities at each of the project dams will be necessary and appropriate to allow access for the target anadromous species to spawning and nursery habitat. Therefore, in view of the evidence in the record, the installation of upstream and downstream anadromous fish passage facilities at all five project dams will provide access to significant habitat for American shad, blueback herring, and Atlantic salmon and is necessary to ensure that the project waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that the installation of upstream and downstream anadromous fish passage facilities,

as set forth above, is necessary to ensure that the project waters will be suitable for the designated uses of fishing and habitat for fish and that the project waters will be of sufficient quality to support all species of fish indigenous to these waters. However, given that it may be some time before passage is required, there should be flexibility in facility design specifications. In addition, a follow-up study should be conducted to evaluate the effectiveness of all facilities in providing passage for the target anadromous species.

6. AQUATIC HABITAT

a. *Existing Conditions.* Water levels and flows in the Presumpscot River are affected by the presence and operation of the project dams. The DEP uses the benthic macroinvertebrate community as an indicator of the general state of aquatic life for the purpose of attainment of water classification standards.

b. *Studies.* In 1997, the applicant conducted a study of the existing macroinvertebrate communities in the project impoundments. Sampling was conducted at six sites, staring below the Dundee Dam and ending in the Saccarappa Dam impoundment. Analysis of the sampling results using the DEP's linear discriminant model indicates that the sampled communities meet applicable Class A and B aquatic life standards, as to the numbers and diversity of species found.

Also in 1997, the applicant conducted a two-phase Habitat and Flow Study of the bypass reach below each of the five project dams. Phase I involved a habitat mapping survey to

characterize the aquatic habitat available in the bypass reaches. Phase II entailed flow demonstration assessments to evaluate the minimum flows needed to meet fisheries and other water quality management goals in the bypass reaches found to contain high quality habitat.

The results of the Phase I study indicated that the bypass reaches of the Dundee, Gambo, and Mallison Falls Projects provide relatively high quality habitat with the greatest potential for supporting a limited season trout fishery maintained by annual stocking, The subsequent Phase II study involved rating the suitability of the aquatic habitat in these bypass reaches under various flows.

Finally, on October 18, 2000, the applicant conducted a flow demonstration of various measured flows in the bypass reaches at the Dundee and Gambo Projects for DEP staff.

c. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

The applicant also proposes to provide minimum flow releases into the bypass reach at each project dam, as described in Section 5(e) above.

d. *Discussion.* There must be both sufficient quality and quantity of habitat for aquatic organisms to meet aquatic life standards. The Department has found that, generally, flows providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of a river or stream, as measured from bank full conditions, are sufficient to meet aquatic life and habitat standards.

However, each waterway is different in terms of the value of various flows in providing, habitat for aquatic life, and conflicts may exist between the habitat needs of various resident aquatic organisms. As a result, on a case-by-case basis, the Department often establishes alternative flows based on identified site-specific conditions and data, where those alternative flows can be shown to meet all water quality standards. Such a case-by-case analysis of the bypass flows needed to meet aquatic life standards at the Presumpscot River Projects follows.

The bypass reaches at the project dams are of particular significance because they represent the only free-flowing waters in the Presumpscot River in the 15.4-mile-long stretch between the Eel Weir Powerhouse in Standish, located at the upstream limit of the North Gorham Project impoundment, and the Cumberland Mills Dam in Westbrook, located downstream from the Saccarappa Project.

There is a reasonable assurance that the applicant's proposals to maintain run-of-river operations will be adequate to ensure that the project impoundments will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative water quality standards for these waters will be satisfied; subject to the other provisions of this Order.

With respect to the Little Falls and Saccarappa bypass reaches, the bottom substrate is primarily ledge, with limited habitat that is suitable to support aquatic life. In view of these site-specific conditions, there is a reasonable assurance that the applicant's proposals for maintaining existing leakage flows to the Little Falls and Saccarappa

bypass reaches will be adequate to ensure that the identified waters will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative water quality standards for these waters will be satisfied, subject to the other provisions of this Order.

With respect to the Gambo bypass reach, habitat suitability for target fish species (brown trout and brook trout) decreases at flows above 40 cfs. However, only 42% of the bypass is wetted at a flow of 40 cfs. Increasing the bypass flow from 40 to 60 cfs increases the wetted area by 17% while reducing habitat suitability for target fish species by only 8%. Finally, substrate conditions here are suitable to support aquatic life during both winter and non-winter periods. In view of these site-specific conditions, there is a reasonable assurance that a year-round minimum flow of 60 cfs in the Gambo bypass reach will improve overall habitat conditions for macroinvertebrates and other aquatic species, including brook trout and brown trout, and is necessary to ensure that these waters will be suitable for the designated use of habitat for aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community, subject to the other provisions of this Order. A follow-up study should be conducted to document attainment of aquatic life standards.

With respect to the Dundee and Mallison Falls bypass reaches, the applicant's proposed 60 cfs minimum flow release during the May through September period meets or exceeds 75% wetted conditions in the bypass reaches and meets aquatic life and habitat standards. However,

providing this flow in October will benefit both macroinvertebrates and target fish species (brook trout and brown trout). In addition, during the winter months, the applicant's proposed flow of 20 cfs provides only 50% wetted conditions in the bypass reaches. Increasing the bypass flow from 20 to 40 cfs increases wetted conditions to between 64% (Dundee) and 68% (Mallison Falls), which provides significantly more habitat for aquatic organisms. Finally, 40 cfs is the breakpoint in the increase in wetted conditions provided by increased bypass flows (flows above 40 cfs provide smaller increases in wetted conditions than do flows up to 40 cfs), In view of these site-specific conditions, minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 in the Dundee and Mallison Falls bypasses reaches will improve overall habitat conditions for macroinvertebrates and other aquatic species, including brook trout and brown trout and are necessary to ensure that these waters will meet applicable water quality standards, subject to the other provisions of this Order. Specifically, there is a reasonable assurance that minimum flows of 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30 in the Dundee and Mallison Falls bypass reaches are necessary to ensure that the identified waters will be suitable for the designated use of habitat for aquatic life and that the identified waters will be of sufficient quality to support all aquatic species indigenous to these waters without detrimental changes in the resident biological community. A follow-up study should be conducted to document attainment of aquatic life standards.

7. DISSOLVED OXYGEN

a. *Existing Conditions.* Except during periods of heavy precipitation or high runoff, the majority of the flow in the Presumpscot River comes from Sebago Lake, which is the public water supply for the metropolitan Portland-South Portland area. The water of Sebago Lake is generally of high quality and has dissolved oxygen levels in excess of all riverine standards both at the surface and at depth. The Presumpscot River is currently classified as Class A from the outlet of Sebago Lake to its confluence with the Pleasant River (about half-way through the Gambo impoundment), and as Class B from this point to the Saccarappa dam. Below the Saccarappa Dam, discharges from the City of Westbrook waste water treatment plant and from the applicant's Westbrook paper mill reduce water quality, and the assigned river classification falls to Class C.

b. *Monitoring Data.* The applicant has conducted water quality monitoring in project impoundment and tailwater areas (except for Dundee Pond, which is Class GPA and thus does not have a dissolved oxygen standard) in accordance with the DEP's river. Sampling Protocol. Sampling was conducted during the summer of 1997 at eleven locations on the Presumpscot River between the Dundee tailrace and the Saccarappa Dam Sampling was conducted at one location each on the Pleasant River and the Little River, which are the two main tributaries to the Presumpscot River.

Analysis of the data indicates that dissolved oxygen standards are met in the Class A segment of the river. However, the data show early morning

non-attainment of Class B dissolved oxygen standards in the Pleasant River and the lower Gambo impoundment The data also show early morning marginal attainment of Class B dissolved oxygen standards in the Little Falls impoundment and the Saccarappa tailwater.

The 1997 data confirm monitoring data collected by DEP in 1993, which showed early morning non-attainment of Class B dissolved oxygen standards in the lower Gambo, Little Falls, and Saccarappa impoundments. Additional confirmation of dissolved oxygen non-attainment in these impoundments, as well as in the lower Gambo impoundment, comes from data collected during the summers of 1998, 1999, 2000, 2001, and 2002 by the Presumpscot River Watch.

c. *Modeling.* The DEP Division Of Environmental Assessment (DEA) has developed a water quality model to predict dissolved oxygen levels in the Presumpscot River. In its "Presumpscot River Waste Load Allocation Final Report" (November 1995), DEA found that, under critical water quality conditions (summer low flow/high water temperature conditions), the model predicted that non-attainment of Class B dissolved oxygen would occur in a 2.4-mile-long reach of the river in the Little Falls and Mallison Falls impoundments. The model was based on hydraulic data and water quality data collected by the DEP during 1993 and 1994.

In a follow-up titled "Supplemental Report to Waste Load Allocation" (March 1998), DEA reported on the results of additional verification runs made on the model using data reported by the U.S. Geological Survey during 1994 and 1995 from a four parameter monitor located at the

Smelt Hill Dam below Westbrook. The model now predicted non-attainment of Class B dissolved oxygen standards under critical water quality conditions in an 8-mile-long reach of the river in the Little Falls, Mallison Falls, and Saccarappa impoundments.

d. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

The applicant also proposes to provide minimum flow releases into the bypass reach at each project dam, as described in Section 5(e) above.

e. *Agency Comments.* In comments dated February 8, 2002 and October 18, 2002, DEA reports that the proposed bypass flows would improve dissolved oxygen conditions in the river (by increasing reaeration), but that model runs indicate continued non-attainment of Class B dissolved oxygen standards. As a result, DEA recommends that, in addition to spillage of bypass flows as discussed in Section 6 above, spillage flows of 50 cfs at Dundee and 100 cfs at Gambo be released whenever river temperatures as measured at the Gambo Dam before 8 AM exceed 22 degrees Celsius. The DEA's model predicts that this spillage will be sufficient to eliminate dissolved oxygen non-attainment under dry weather conditions. The model further predicts that, even with the recommended spillage flows, there will still be dissolved oxygen non-attainment in the river under wet weather conditions, due to the presence of significant non-point source pollution coming primarily from tributary streams (e.g., the Pleasant River and the Little River). As a

result, DEA further recommends that non-point source pollution abatement measures also be taken in order to ensure compliance with Class B dissolved oxygen standards under wet weather conditions.

f. *NGO Comments.* In comments dated August 1, 2001 and September 30, 2002, non-governmental organizations (NGOs) American-Rivers and Friends of the Presumpscot River contend that the five Presumpscot River Projects are causing or contributing to the failure of the river to meet applicable dissolved oxygen criteria and that additional measures must be taken to meet water quality standards.

g. *Discussion.* Dams can lower dissolved oxygen concentrations by reducing natural reaeration, increasing time of travel, increasing water temperature, and creating settling basins for sediments and nutrients.

The evidence in the record indicates that the non-attainment of dissolved oxygen standards (both modeled and monitored) in the Presumpscot River is the result of (1) the existence of multiple impoundments in close proximity to one another, (2) the lack of natural reaeration below the dams, (3) the over-night respiration of bottom attached algae, and (4) the impact of non-point sources of pollution (e.g. agricultural runoff and sedimentation from land use activities). Were it not for the presence and current operation of the project dams, the Presumpscot River would meet Class B dissolved oxygen standards, particularly under dry weather conditions when the effect of non-point source pollution on dissolved oxygen levels is minimal. It therefore follows that the dams cause or contribute to the violation of

dissolved oxygen standards in the river, and that appropriate changes in project structures and/or operation must be made to eliminate the dams' contribution to the violation of standards.

It is noted that there are several measures that could be effective in increasing dissolved oxygen concentrations in the river. These include, but may not be limited to, spillage, turbine venting, air/oxygen injection, and partial impoundment drawdowns. Some of these measures may be more cost-effective for the applicant than others.

It is further noted that the applicant is not responsible for the presence of non-point source pollution in the river and thus should not be responsible for the abatement of this pollution. Similarly, the applicant should not be responsible for mitigating the effects of such pollution on dissolved oxygen concentrations under wet weather conditions.

In view of the evidence in the record, the spillage of 50 cfs at the Dundee Project and 100 cfs the Gambo Project, in addition to the spillage of bypass flows as discussed in Section 6 above, whenever river temperatures as measured at the Gambo Dam before 8 AM exceed 22 degrees Celsius, or other equivalent measures, will improve dissolved oxygen concentrations in the river and are necessary to meet Class B dissolved oxygen standards in the river under dry weather conditions. A follow-up study should be conducted to evaluate the effectiveness of spillage or any other measures implemented to improve dissolved oxygen concentrations.

8. RECREATIONAL ACCESS AND USE

a. *Existing Conditions.* Existing recreational activities in and adjacent to the Presumpscot River include fishing, canoeing and other open water boating, swimming, hiking, picnicking, hunting, and snowmobiling.

There are numerous existing formal and informal recreation facilities within the areas of the Presumpscot River Hydro Projects.

b. *Applicant's Proposals.* The applicant proposes to develop a Recreational Facility Enhancement Plan for each of the five projects. Each Plan will consist of various measures intended to maintain and/or enhance recreational access and use in the project areas, as summarized in Section 1(e) above.

c. *Discussion.* There is a reasonable assurance that the applicant's proposals will be adequate to ensure that the project waters are suitable for the designated use of recreation in and on the water, subject to other provisions of this Order.

9. WETLANDS AND WILDLIFE RESOURCES

a. *Existing Conditions.* The areas in and adjacent to the Presumpscot River Hydro Projects support various wildlife species common to southern Maine river corridor habitats that range from urban to suburban to rural in character. Typical wildlife resources include songbird and predatory bird species, small mammals, large game animals, and amphibians. A 1997 survey did not reveal the presence of any rare, threatened or endangered species in the project areas, though bald eagles may over winter in the area.

There are four wetland community types within the combined project areas, totaling almost 108 acres. These include palustrine forested, palustrine scrub-shrub, palustrine emergent, and palliating unconsolidated bottom. The majority of the existing wetlands rely on river flows and/or flooding for hydrologic inputs.

More than half of the wetlands are palustrine forested wetlands, while 74% of the total wetland acres occur in the area above the Saccarappa Dam.

b. *Applicant's Proposals.* The applicant proposes to continue run-of-river operation and daily headpond monitoring and to avoid drawdowns of the project impoundments for maintenance during May and June.

d. *Discussion.* There is a reasonable assurance that the applicant's proposals will be adequate to ensure that the project waters contained in wetlands are suitable for the designated uses of habitat for aquatic life, subject to the other provisions of this Order.

10. HYDROELECTRIC POWER GENERATION

a. *Existing Generation.* The five Presumpscot River Projects currently have a combined installed capacity of 7,450 kW and generate an average of about 40,500,000 kilowatt-hours of electricity annually. Individual project generation and fuel equivalency data is given in the following table:

Existing Generation – Presumpscot River Projects

Project	Installed Capacity (kW)	Annual Generations (kWh)	Fuel Equivalencies	
			Oil @600 kWh/barrel	Coal @2158 kWh/ton
Dundee	2,400	16×10^6	26,667 barrels	7,414 tons
Gambo	1,900	8.5×10^6	14,167 barrels	3,939 tons
Little Falls	1,000	4.2×10^6	7,000 barrels	1,946 tons
Mallison Falls	800	4.2×10^6	7,000 barrels	1,946 tons
Saccarappa	1,350	7.6×10^6	12,667 barrels	3,522 tons
TOTALS	7,450	40.5×10^6	67,501 barrels	18,767 tons

b. *Existing Energy Policies/Plans.* The State of Maine has developed a comprehensive energy plan (Final Report of the Commission on Comprehensive Energy Planning, May 1992) with the goal of meeting the State's energy needs with reliable energy supplies at the lowest possible cost, while assuring that energy production and use are consistent with a healthy environment and vibrant economy. Specifically, the Plan establishes the following targets for Maine's energy future:

- Reduce the State's level of dependence on oil from 50% to at least the national average of 43% by the year 2000, with further reductions to at least the 30% level by 2010;
- Increase the percentage of renewable energy resources in the State's primary energy mix from 30% to 40% by the year 2000, and to at least 50% by 2010;

- Increase statewide energy efficiency relative to 1990 levels by 25% by the year 2000 and by at least 50% by 2010; and
- Work to stabilize long-term energy prices, in balance with Maine's other energy-related goals, with a special emphasis on enhancing Maine's competitive position relative to New England and the United States.

With respect to renewable energy, the Plan recommends that Maine actively encourage the development of wind and solar energy resources and support the continued utilization and further development, where appropriate, of the State's renewable, indigenous hydro and biomass energy resources.

c. *Applicant's Proposals.* The applicant is proposing to continue to operate the five projects as run-of-river projects providing base-load power to the applicant's Westbrook paper mill. Together, the projects provide about 22.5% of the annual energy demand of the Westbrook mill.

d. *Discussion.* The evidence in the record (FERC FEIS, June 2002) indicates that the minimum bypass flows, spillage flows, and fish passage facilities discussed above will reduce average annual generation from 40.5 million to 34.5 million kWh. Individual project generation and fuel equivalency data for future generation based on the terms and conditions of this certification is given in the following table:

Future Generation – Presumpscot River Projects

Project	Installed Capacity (kW)	Annual Generations (kWh)	Fuel Equivalencies	
			Oil @600 kWh/barrel	Coal @2158 kWb/ton
Dundee	2,400	13.5×10^6	22,500 barrels	6,256 tons
Gambo	1,900	7.3×10^6	12,167 barrels	3,383 tons
Little Falls	1,000	3.5×10^6	5,833 barrels	1,622 tons
Mallison Falls	800	3.6×10^6	6,000 barrels	1,668 tons
Saccarappa	1,350	6.6×10^6	11,000 barrels	3,058 tons
TOTALS	7,450	34.5×10^6	57,500 barrels	15,987 tons

In view of the evidence in the record, there is a reasonable assurance that the proposed operation of the projects, as conditioned by this approval, will be adequate to ensure that the project waters are suitable for the designated use of hydroelectric power generation.

BASED on the above FINDINGS OF FACT and the evidence contained in the applications, and subject to the conditions listed below, the Department CONCLUDES that the continued operation of the Presumpscot River Hydro Projects, as described above, will result in all waters affected by the project being suitable for all designated uses and meeting all other applicable water quality standards, provided that:

1. Run-of-river operations are continued at the project dams, and adequate minimum flows are provided into the bypass reach at each project, as discussed above;

2. Impoundment drawdowns for maintenance are avoided during May and June and impoundment refill procedures are implemented, as proposed;

3. Upstream eel passage facilities are installed at all project dams;

4. Operational measures are instituted at all project dams to provide downstream eel passage, as discussed above;

5. Upstream and downstream anadromous fish passage facilities are installed at all project dams, as discussed above;

6. Additional spillage is instituted or other equivalent measures are taken at the Dundee and Gambo Projects to meet Class B dissolved oxygen standards in the river under dry weather conditions, as discussed above; and

7. A Recreational Facility Enhancement Plan is developed and implemented for each project, as proposed.

THEREFORE, the Department APPROVES the applications of S.D. WARREN COMPANY and GRANTS CERTIFICATION that there is a reasonable assurance that the continued operation of the PRESUMPSCOT RIVER HYDRO PROJECTS, as described above, will not violate applicable water quality standards. SUBJECT TO THE FOLLOWING CONDITIONS:

1. WATER LEVELS AND FLOWS

   A. Except as temporarily modified by (1) approved maintenance activities, (2) extreme hydrologic conditions, as defined below, or (3) emergency electrical system conditions, as defined below or (4) agreement between the applicant and other appropriate state and/or federal agencies,

all projects shall be operated in a run-of-river mode, with outflow approximately equal to inflow on an instantaneous basis except during flashboard failure or replacement, and with impoundment levels maintained within 1 foot of full pond when flashboards are in place and within 1 foot of spillway crest elevation when flashboards are not in place.

B. Except as temporarily modified by (1) approved maintenance activities, (2) extreme hydrologic conditions, as defined below, or (3) emergency electrical system conditions, as defined below or (4) agreement between the applicant and other appropriate state and/or federal agencies, the following minimum flow releases shall be provided annually into the project bypass reaches:

- Dundee: 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30.
- Gambo: 60 cfs year-round.
- Little Falls: Existing leakage (approximately 26 cfs).
- Mallison Falls: 60 cfs from May 1 through October 31 and 40 cfs from November 1 through April 30.
- Saccarappa: Existing leakage (approximately 13 cfs).

Minimum bypass flows shall consist of uncontrolled leakage, spillage, and any flows released into the bypass reaches through any upstream and downstream eel passage and anadromous fish passage facilities provided at the projects. To the extent possible, all minimum flows shall be

provided as spillage at the project dams, in order to provide maximum reaeration.

C. "Extreme Hydrologic Conditions" means the occurrence of events beyond the Licensee's control such as but not limited to abnormal precipitation, extreme runoff, flood conditions, ice conditions or other hydrologic conditions such that the operational restrictions and requirements contained herein are impossible to achieve or are inconsistent with the safe operation of the Project.

D. "Emergency Electrical System Conditions" means operating emergencies beyond Licensee's control which require changes in flow regimes to eliminate such emergencies which may in some circumstances include but are not limited to equipment failure or other abnormal temporary operating condition, generating unit operation or third-party mandated interruptions under power supply emergencies; and orders from local, state or federal law enforcement or public safety authorities.

E. The applicant shall, within 6 months of issuance of a New License for the project by FERC or upon such other schedule as established by FERC, submit plans for providing and monitoring run-of-river operations, impoundment levels, and minimum bypass flows as required by Parts A and B of this condition. These plans shall be reviewed by and must receive the approval of the DEP Bureau of Land and Water Quality.

F. Upon completion of a habitat assessment by the Atlantic Salmon Commission and notification to the applicant of initiation of active Atlantic salmon restoration activities in the Presumpscot

River, the applicant shall conduct a study to evaluate the effectiveness of the minimum bypass flows required by Part B of this condition in providing habitat for various life stages of Atlantic salmon.

G. The applicant shall, within 6 months after notification from the Atlantic Salmon Commission on initiation of active Atlantic salmon restoration activities ir the Presumpscot River, or upon such ether schedule as established by PERC, submit plans for a study to evaluate the effectiveness of minimum bypass flows required by Part B of this condition in providing habitat for Atlantic salmon, prepared in consultation with ASC. This study shall include evaluation of the effectiveness of bypass flows in providing habitat for Atlantic salmon spawning and egg incubation and production of juvenile Atlantic salmon. This plan shall be reviewed by and must receive approval of the DEP prior to implementation. In reviewing the plan, the DEP will consider the recommendations of the ASC.

H. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any bypass flow effectiveness study, along with any recommendations for changes in the minimum bypass flows required by this condition. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the Department reserves the right to require such changes in the minimum bypass flows established in this certification as may be deemed necessary to provide Atlantic salmon habitat in the bypass reaches.

2. IMPOUNDMENT DRAWDOWN AND REFILL PROCEDURES

   A. The applicant shall, unless necessary to address emergency situations or to address dam safety and/or public safety concerns, avoid maintenance drawdowns of the project impoundments during the months of May and June.

   B. The applicant shall implement the following procedures for refilling the project impoundments after any impoundment drawdowns:

      - If allowed under the FERC-approved Sebago lake level management plan, outflows shall be temporarily increased from Sebago Lake to refill the impoundments while flows from each project are maintained as required by the flow/temperature curve component of the lake level management plan.

      - If increased outflows from Sebago Lake are not allowed under the FERC-approved Sebago lake level management plan, a maximum of 25% of the outflow from Sebago Lake shall be used to refill the impoundments while flows from each project are maintained at 75% or more of the outflow from Sebago Lake.

3. UPSTREAM EEL PASSAGE

   A. Upstream eel passage facilities shall be installed and operational at all projects within 2 years following the issuance of a new FERC license for the projects.

   B. The applicant shall, at least 60 days prior to construction or upon such other schedule as established by FERC, submit final design and operational plans for the upstream eel passage

facilities required by Part A of this condition, prepared in consultation with the Department of Marine Resources. These plans shall be reviewed by and must receive the approval of DEP prior to construction. In reviewing the plans, the DEP will consider the recommendations of DMR.

C. The applicant shall, in consultation with the Department of Marine Resources, conduct a study or studies to determine the effectiveness of the upstream eel passage facilities required by this condition.

D. The applicant shall, concurrent with the commencement of facilities operation or upon such other schedule as established by FERC, submit plans for a study or studies to determine the effectiveness of the upstream eel passage facilities required by Part A of this condition, prepared in consultation with the Department of Marine Resources. These plans shall be reviewed by and must receive the approval of DEP prior to implementation. In reviewing the plans, the DEP will consider the recommendations of DMR.

E. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any upstream eel passage effectiveness studies, along with any recommendations for changes in the design and/or operation of any passage facilities installed pursuant to this condition.

F. The applicant shall be responsible for taking such actions as are needed to effectively pass eels upstream through the projects. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the

Department reserves the right to require reasonable changes in the design and/or operation of the upstream eel passage facilities installed pursuant to this condition as may be deemed necessary to effectively pass eels upstream through the projects.

4. DOWNSTREAM EEL PASSAGE

A. The applicant shall, immediately following the issuance of a new FERC license for the projects, institute operational measures to provide downstream eel passage at all projects. These measures must include suspending generation at each project for at least 4 hours per night for at least four one-week periods during the downstream eel migration period. The timing of the generation shutdown shall be determined each year, in consultation with the Department of Marine Resources, to maximize the expected benefit for downstream eel migration.

B. The applicant shall, in consultation with the Department of Marine Resources, conduct a 3-year study to determine the exact timing of the generation shutdown, so as to result in the optimum benefit for downstream eel migration.

C. The applicant shall, within 60 days following the issuance of a new FERC license for the project or upon such other schedule as established by FERC, submit plans for a study to determine the exact timing of the generation shutdown required by Part B of this condition, prepared in consultation with the Department of Marine Resources. These plans shall be reviewed by and must receive the approval of DEP prior to implementation. In reviewing the plans, the DEP will consider the recommendations of DMR.

D. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of the downstream eel passage study, along with any recommendations for the exact timing of the generation shutdowns required by this condition.

E. The applicant shall be responsible for taking such actions as are needed to effectively pass eels downstream through the projects. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the Department reserves the right to require changes in the timing of the operational shutdowns required by this condition as may be deemed necessary to effectively pass eels downstream through the projects.

F. In the event that downstream passage facilities are installed at a project pursuant to Condition 5 below, the applicant may, in consultation with the Department of Marine Resources, conduct a study to determine the effectiveness of these facilities in passing eels downstream through the project. Upon request by the applicant, and after reviewing the study results and the recommendations of DMR, the Department reserves the right to reduce or terminate the operational shutdowns required by this condition.

5. UPSTREAM AND DOWNSTREAM ANADROMOUS FISH PASSAGE

SACCARAPPA PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* A Denil "fish ladder," or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after passage is available at the downstream Cumberland Mills Dam.

- *Phase II.* Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 58,000 American shad, 353,000 blueback herring, and 426 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Saccarappa Dam, whichever comes first.

MALLISON FALLS PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* A Denil "fish ladder," or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 4,200 American shad, 26,000 blueback herring, and 32 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after passage of at least 2,960 American shad or 18,020 blueback herring in any single year at the downstream Saccarappa Project.

- *Phase II.* Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 44,000 American shad, 270,000 blueback hearing, and 185 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be

operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Mallison Falls Dam, whichever comes first.

LITTLE FALLS PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* A Denil "fish ladder," or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 3,100 American shad, 19,000 blueback herring, and 15 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after passage of at least 2,960 American shad or 18,020 blueback herring in any single year at the downstream Saccarappa Project.

- *Phase II.* Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 43,000 American shad, 263,000 blueback herring, and 168 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of

Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Little Falls Dam, whichever comes first.

GAMBO PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* No upstream fish passage facilities required.
- *Phase II.* A fish lift, or other passage facilities of comparable efficiency in passing the target, designed to pass up to 40,000 American shad, 244,000 blueback herring, and 153 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) passage of at least 620 American shad or 3,800 blueback herring in any

single year at the downstream Little Falls Project.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Gambo Dam, whichever comes first.

DUNDEE PROJECT

A. The applicant shall install and operate the following upstream fish passage facilities at the project:

- *Phase I.* No upstream fish passage facilities required.
- *Phase II.* A fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 20,000 American shad, 122,000 blueback herring, and 64 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission of initiation of Phase II restoration above Gambo Dam and (2) passage of at least 4,020 American shad or 24,460 blueback herring in any single year at the downstream Gambo Project.

B. The applicant shall install and operate downstream passage facilities designed to pass American shad, blueback herring, and Atlantic salmon at the project. These facilities shall be operational concurrent with the completion of upstream anadromous fish passage facilities at the project or within 2 years following notification by the Department of Marine Resources or the Atlantic Salmon Commission of sustained stocking of anadromous fish above the Dundee Dam, whichever comes first.

ALL PROJECTS

C. The applicant shall, at least 180 days prior to construction or upon such other schedule as established by FERC, submit final design and operational plans for the upstream and downstream anadromous fish passage facilities required by Parts A and B of this condition, prepared in consultation with the Department of Marine Resources and the Atlantic Salmon Commission. These plans shall be reviewed by and must receive the approval of DEP prior to construction. In reviewing the plans, the DEP will consider the recommendations of the ASC and DMR.

D. The applicant shall, in consultation with the Department of Marine Resources and the Atlantic Salmon Commission, conduct a study or studies to determine the effectiveness of the upstream and downstream anadromous fish passage facilities required by this condition.

E. The applicant shall, concurrent with the commencement of facilities operation or upon such other schedule as established by FERC, submit plans for a study or studies to determine the effectiveness of the upstream and downstream

anadromous fish passage facilities required by Parts A and B of this condition, prepared in consultation with the Department of Marine Resources and the Atlantic Salmon Commission. These plans shall be reviewed by and must receive the approval of DEP prior to implementation. In reviewing the plans, the DEP will consider the recommendations of the ASC and DMR.

F. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any upstream and downstream anadromous fish passage effectiveness studies, along with any recommendations for changes in the design and/or operation of any passage facilities installed pursuant to this condition.

G. The applicant shall be responsible for taking such actions as are needed to effectively pass anadromous fish upstream and downstream through the projects, insofar as passage is required in accordance with Parts A and B of this condition. After reviewing the results of the study, and after notice to the applicant and opportunity for hearing, the Department reserves the right to require reasonable changes in the design and/or operation of the upstream and downstream anadromous fish passage facilities installed pursuant to this condition as may be deemed necessary to effectively pass anadromous fish upstream and downstream through the projects.

6. REAERATION MEASURES

A. The applicant shall, commencing with the issuance of a new FERC license for the project, institute the spillage of 50 cfs at the Dundee Dam

and 100 cfs at the Gambo Dam, or take other equivalent measures as may be approved by the Department in order to meet Class B dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam under dry weather conditions. Spillage must occur whenever river temperatures exceed 22 degrees Celsius, as measured at the Gambo Dam before 8 AM, and shall be in addition to the minimum bypass flows required by Condition 1 above.

B. The applicant shall, within 6 months of issuance of a New License for the project by FERC or upon such other schedule as established by FERC, submit plans for providing and monitoring spillage or other approved reaeration measures as required by Part A of this condition. These plans shall be reviewed by and must receive the approval of the DEP Bureau of Land and Water Quality.

C. The applicant shall, in consultation with the Department, conduct a study or studies to determine the effectiveness of the spillage or other measures required by this condition in meeting Class B dissolved oxygen standards.

D. The applicant shall, within 60 days following the issuance of a new FERC license for the project or upon such other schedule as established by FERC, submit plans for a study or studies to determine the effectiveness of the spillage or other measures taken pursuant to Part A of this condition in meeting Class B dissolved oxygen standards. These plans shall be reviewed by and must receive the approval of DEP prior to implementation.

E. The applicant shall, in accordance with a schedule set forth in the study plan or upon such other schedule as established by FERC, submit the results of any studies to determine the effectiveness of the spillage or other measures taken pursuant to Part A of this condition to meet Class B dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam, along with any recommendations for changes in measures taken pursuant to this condition.

F. The applicant shall be responsible for taking such actions as are needed to meet dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam, insofar as the project dams cause, or contribute to a violation of these standards under dry weather conditions. After reviewing the study results, and after notice to the applicant and opportunity for hearing, the Department will reopen and modify the terms of this certification to require reasonable changes in the design and/or operation of the projects as may be deemed necessary to meet Class B dissolved oxygen standards in the river from Dundee Dam to Saccarappa Dam under dry weather conditions.

7. RECREATIONAL FACILITIES

A. The applicant shall develop and implement a Recreational Facility Enhancement Plan for each project, which shall include, at a minimum, the following measures to maintain and/or enhance recreational access and. use in the project areas:

DUNDEE PROJECT

- Rerouting, stabilizing, and maintaining the existing canoe portage trail;

- Seeking an easement to provide walk-in angler access to the project bypass reach; and
- Investigating whether an existing access easement can be altered to permit fishery agency access for stocking purposes.

GAMBO PROJECT

- Enhancing and maintaining the existing informal canoe portage trail;
- Developing an interpretive sign to explain the history of the Oriental Powder Mill Complex;
- Providing walk-in angler access to the bypass reach;
- Developing parking and signs for carry-in boat access at the portage take-out location; and
- Assisting the Town of Gorham in regrading and enhancing the Gambo Road approach to the former bridge area immediately upstream from the dam.

LITTLE FALLS

- Establishing and maintaining a canoe portage trail;
- Assist Gorham Trails in developing parking. signage, and access for a carry-in boat launch at the Gorham Land Trust Property off of the Tow Path Road; and
- Donate approximately 0.8 acres of land on the island located off-shore of the Hawkes Property to the Gorham Land Trust.

MALLISON FALLS

- Es'ablishing and maintaining a formal canoe portage trail;
- Providing signs for parking and access at the existing carry-in boat access site at the project powerhouse;
- Developing parking, signage, and access for a carry-in boat a.:ess site above the project dam;
- Seeking permission from the Department of Transportation and the Town of Gorham to provide a roadside pullout and carry-in boat access site next to the bridge abutment above the project dam; and
- Continuing to seek an easement or other opportunities to provide walk-in angler access to the bypass reach.

B. The applicant shall, within 12 months following the issuance of a new FERC license for the project or upon such other schedule as established by FERC, submit a Recreational Facility Enhancement Plan for each project as required by Part A of this condition. This plan shall be prepared in consultation with the Department of Conservation and the Department of Inland Fisheries and Wildlife, and shall include a schedule for implementation. This plan shall be reviewed by and must receive approval of the DEP.

8. LIMITS OF APPROVAL

This approval is limited to and includes the proposals and plans contained in the applications and supporting documents submitted and affirmed to by the applicant.

9. COMPLIANCE WITH ALL APPLICABLE LAWS

The applicant shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements and orders required for the operation of the projects in accordance with the terms of this certification.

10. EFFECTIVE DATE

This water quality certification shall be effective concurrent with the effective date of the licenses issued for the projects by the Federal Energy Regulatory Commission.

DONE AND DATED AT AUGUSTA. MAINE, THIS 30TH DAY OF April, 2003.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: /s/ Dawn R. Gallagher
Dawn R. Gallagher, Commissioner

PLEASE SEE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

Date of receipt of application: 12/20/2002

Date application accepted for processing: 12/30/2002

(Initial application received 01/14/1999 and subsequently withdrawn and refiled 01/12/2000, 01/11/2001, and 12/20/2002)

Date filed with Board of Environmental Protection MAY 1, 2003.

This Order prepared by Dana Murch, Bureau of Land & Water Quality.

STATUTORY PROVISIONS INVOLVED

The issues presented involve interpretation of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251 *et seq.*, and the Federal Power Act, 16 U.S.C. § 79la *et seq.* The pertinent text from both acts, beginning with the Clean Water Act, follows.

Clean Water Act

33 U.S.C. § 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as

provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

. . . .

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in

(A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made,

(C) the water quality criteria applicable to such waters or

(D) applicable effluent limitations or other requirements.

. . . .

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, and 1317 of this title.

. . . .

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

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§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of

pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either

(A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or

(B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

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§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means

(A) any addition of any pollutant to navigable waters from any point source,

(B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . . .

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

Federal Power Act

16 U.S.C. § 797. General powers of Commission

The Commission is authorized and empowered –

. . . .

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc. To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided. . . . In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

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§ 799. License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

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§ 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other

beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by –

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from

cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capability for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

. . . .

. . . .

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

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§ 821. State laws and water rights unaffected

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.